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CASES ARGUED AND DETERMINED

IN

THE COURT OF COMMON PLEAS,

AND IN THE

EXCHEQUER CHAMBER,

IN

EASTER TERM AND VACATION AND TRINITY TERM, 1864.

BY

JOHN SCOTT, ESQ.,

OF THE INNER TEMPLE, BARRISTER-AT-LAW.

VOL. XVI.

WITH REFERENCES TO DECISIONS IN THE AMERICAN COURTS.

WILLIAM WYNNE WISTER, JR., ESQ.,

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THE COURT OF COMMON PLEAS,
DURING THE PERIOD COMPRISED IN THIS VOLUME.

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The Hon. Sir EDWARD VAUGHAN WILLIAMS, Knt.
The Hon. Sir JAMES SHAW WILLES, Knt.
The Hon. Sir JOHN BARNARD BYLES, Knt.
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ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,
AND IN THE
EXCHEQUER CHAMBER,
IN
Hilary Vacation,

IN THE
TWENTY-SEVENTH YEAR OF THE REIGN OF VICTORIA. 1864.

Gilliespie

MEMORANDA.

On the 10th day of February, 1864, Mr. Serjeant Parry received a patent of precedence, to take rank next after Mr. Serjeant Ballantine.

On the 15th day of February, 1864, David Deady Keane, Esq., and John James Johnson, Esq., of the Middle Temple, and William Field, Esq., of the Inner Temple, were appointed Her Majesty's Counsel learned in the Law.

On the 9th day of February, 1864, John Simon, Esq., of the Middle Temple, Alexander Pulling, Esq., of the Inner Temple, and Henry Tindal Atkinson, Esq., of the Middle Temple, were called to the degree of the Coif. They gave rings with the following mottoes:—

Mr. Serjeant Simon, "In concilio justorum."

Mr. Serjeant Pulling, "Jura servare."

Mr. Serjeant T. Atkinson, "Vincit qui patitur."

*2] *In the Matter of a Suit in the Mayor's Court, London,
in which

JOHN COCHRANE is approver,
CHARLES BROWN is plaintiff,
ALEXANDER ROSE, WILLIAM GRAHAM, and ROBERT
PORTER WILSON are garnishees,
and
ROBERT JOSEPH CARBERY is defendant. Feb. 1.

A vesting-order made upon the petition of a trading firm under the Indian Insolvency Act, 11 & 12 Vict. c. 21, vests in the official assignee the separate property of each partner as well as the joint-estate of the firm.

THIS was a bill of proof in the Mayor's Court, London. The facts out of which the proceeding arose were as follows:—The defendant R. J. Carbery carried on business in Calcutta in copartnership with one Annie Carbery as milliners and dress-makers. R. J. Carbery also carried on separately the business of a merchant; and he having consigned certain goods to Messrs. Rose & Co., in London, the proceeds were attached in their hands by the plaintiff Brown; whereupon Cochrane, claiming as assignee under an Indian insolvency of Carbery, filed his bill of proof.

The following is a copy of the recorder's notes of the trial:—

"Action entered 15th of October, 1862.

"Attachment made 15th of October, 1862.

"Bill of proof filed 17th of November, 1862.

"Probation,—That money attached is money due and payable by garnishees to approver as and being the assignee of the defendant; that the moneys attached first came to the hands of the garnishees as and for, and were, the moneys of the defendant; and that, before, &c., that is to say, on the 14th of April, 1862, the defendant, together with one Annie Carbery, duly filed a petition in Calcutta under the Insol-
*3] vent Debtors Act, 11 & 12 Vict. c. 21, and thereupon, the *defend-
ant being subject to the jurisdiction, &c., the court on the 14th of April, 1862, made an order vesting the estate and effects of the defendant in said approver, and said order still in force, &c.

"Plea, 5th of December, 1862, that the said moneys so attached, &c., were at the time of the said attachment and still are the proper moneys of the defendant, and not of said approver. Issue.

"The following admissions were made,—that the property attached came into the hands of the garnishees in the name of the defendant; that the money attached was part of the separate estate of the defendant; and that the defendant and Annie Carbery were insolvent in Calcutta.

"The following documents were given in evidence,—examined copy of the schedule, and the vesting order vesting the property in the approver."

The schedule was headed as follows:—"The schedule of Robert Joseph Carbery and Annie Carbery, spinster, of Government Place, in the town of Calcutta. In the matter of Robert Joseph Carbery and Annie Carbery, spinster, lately carrying on trade and business as milliners and dress-makers and traders under the name or style of

Annie Carbery, and the said Robert Joseph Carbery also for some time carrying on business as *an oil-merchants and a traders*, insolvent."

The vesting order was as follows:—

"In the court for the relief of insolvent debtors at Calcutta:

"In the matter of the petition of Robert Joseph Carbery and Annie Carbery, spinster, lately carrying on trade and business as milliners and dress-makers and traders under the name or style of Annie Carbery, and the said Robert Joseph Carbery also for some time carrying on business as *an oil-merchants* and traders, seeking the benefit of the act of the Eleventh *year of the reign of Her present Majesty, intituled 'An act to consolidate and amend the laws relating to [^{*4} Insolvent Debtors in India:'

"Victoria, by the grace of God, of the united kingdom of Great Britain and Ireland, Queen, &c.: Whereas, the above-named Robert Joseph Carbery and Annie Carbery, being indebted and in insolvent circumstances, hath presented their petition to this court for relief under the provisions of the said act, and such petition and their schedule have been filed in this court: It is ordered that all the real and personal estate and effects of the said Robert Joseph Carbery and Annie Carbery, both within the territories within the limits of the charter of the East India Company and without, except the wearing-apparel, bedding, and other such necessities of the said Robert Joseph Carbery and Annie Carbery and their families, and the working tools and implements of the said Robert Joseph Carbery and Annie Carbery and their families, not exceeding in the whole the value of company's rupees 300, and *all debts due to them*, and all the future estate, right, title, interest, and trust of the said Robert Joseph Carbery and Annie Carbery in or to any real or personal estate or effects within or without the said territories, which the said Robert Joseph Carbery and Annie Carbery may purchase, or which may revert, descend, be devised or bequeathed or come to *them*, and all debts growing due to *them* which under the provisions of the said act of the Eleventh year of the reign of Her said Majesty may be distributable under this insolvency, shall be and are hereby vested in the official assignee for the time being of the court for the relief of insolvent debtors in the presidency of Fort William in Bengal, subject to the provisions of the hereinbefore-recited act: And it is further ordered that all books, papers, deeds, and writings in any way *relating to the estate and effects of the said Robert Joseph Carbery and Annie Carbery in [^{*5} their possession or under their custody or control, be deposited with such assignee: And it is further ordered that the chief clerk of this court do publish the substance of this order once in the Calcutta Gazette."

The learned recorder directed a verdict to be entered for the plaintiff, reserving leave to the approver, Cochrane, to move to enter the verdict for him for the amount of the moneys attached.

Henry James, on a former day in this term, obtained a rule nisi accordingly.

Philbrick now showed cause.—Under the 11 & 12 Vict. c. 21, the joint insolvency of a firm does not operate the separate insolvency of the individual partners. The 5th section of that statute enacts that "any person who shall be in prison within the respective limits of

the towns of Calcutta, Madras, and Bombay, upon any process whatsoever, for or by reason of any debt, damages, costs, or money which such person is *solely* or *jointly with any other* liable to pay, &c., or who shall reside within the jurisdiction of any of the supreme courts at Calcutta, Madras, and Bombay, respectively, and, being indebted on account of any such liability as aforesaid, shall be in insolvent circumstances, may at any time apply by petition to the court for the relief of insolvent debtors within the presidency where such insolvent debtor shall then be, for the benefit of the provisions of this act, which petition may be in the form in the schedule A. to this act, or the schedule B.(a) to this act (as the case may require), with such additions and

*6] variations as may be *necessary to adapt it to the particular case; and such petition shall be subscribed by the said prisoner, and shall forthwith be filed in the said court to which it shall be presented; and, if any such person as aforesaid shall be jointly indebted, it shall be lawful for them(b) to apply jointly by petition, in such manner as is hereinbefore mentioned, and under such joint petition the joint estate and the separate estates of such petitioners shall be dealt with and distributed." Robert Joseph Carbery, it appears, was within the jurisdiction of the supreme court at Calcutta; and the firm of Carbery & Co., of which he was a member, petitioned under the act; and a vesting order was made which purports to deal with the joint property of the firm, and nothing more. The debt in question, therefore, did not pass to the approver Cochrane, and would not be distributable amongst the creditors of the firm: s. 42. The effect and operation of the vesting order is regulated by the 7th section, which enacts, that, "upon the filing of any such petition as is aforesaid, it shall be lawful for the said court, and the said court is hereby authorized and required, to order that all the real and personal estate and effects of such petitioner, whether within the territories within the limits of the charter of the East India Company or without, except the wearing apparel, &c., and all debts due to him, and all the future estate, right, title, interest, and trust of the said petitioner in or to any real or personal estate or effects within or without the said territories which such petitioner may purchase, or which may revert, descend, be devised or bequeathed, or come to him, and all debts growing due to him before the court shall have made its order in the nature of a certificate as hereinafter mentioned, do vest in the official assignee for the time being of the said court;" "and such order, when so made, shall by

*7] virtue of this act *relate back to and take effect from the filing of the said petition, and shall instantly, and without any conveyance or assignment, vest all the real and personal estate, effects, and debts as aforesaid in the said official assignee, who shall have full powers for the recovery thereof, and shall hold and stand possessed of the same for the purposes and in manner hereinafter mentioned." Under the vesting order, therefore, the *joint property* of Robert Joseph Carbery and Annie Carbery alone passed to the approver, leaving the separate property of the former wholly untouched. Consequently, the debt due to him from Rose & Co. was properly attached at the suit of Brown, the plaintiff.

(a) The former being a petition by a party in custody, the latter by one not in custody.

(b) Sic.

Henry James, in support of his rule.—By the express words of the 5th section of the 11 & 12 Vict. c. 21, both joint and separate estates are to be dealt with under the petition; and it did not require a separate vesting order to enable the official assignee to deal with the separate property of Robert Joseph Carbery. The debt which was the subject of Brown's attachment was legally vested in Cochrane, the approver, and he is entitled to have the verdict entered for him.

ERLE, C. J.—I am of opinion that this rule should be made absolute. The short facts are as follows:—On the 15th of November, 1862, a debt due from Messrs. Rose & Co. in London to Robert Joseph Carbery, a merchant at Calcutta, was attached by process out of the Mayor's Court at the suit of Brown. The approver, Cochrane, came in and claimed the debt as assignee of Robert Joseph Carbery under an Indian insolvency of the 14th of April, 1862. The proceedings under that insolvency were put in: and the point now before us for decision, is, whether or not the separate estate of **each partner* [*8] passed to the assignee as well as the joint estate of the firm. I am of opinion, that, under the 5th section of the statute 11 & 12 Vict. c. 21, the separate property of each as well as the joint property of the firm did pass by the vesting order. It follows, therefore, that the debt in the hands of the garnishees was due to Cochrane, and that he ought to have succeeded in the Mayor's Court. The 5th section contemplates the insolvency of two or more partners: it enacts that "any person who shall be in prison within the respective limits of the towns of Calcutta, Madras, and Bombay, upon any process whatsoever, for or by reason of any debt, damages, costs, or money which such person is *solely or jointly with any other* liable to pay, &c., or who shall reside within the jurisdiction of any of the supreme courts at Calcutta, Madras, and Bombay, respectively, and, being indebted on account of any such liability as aforesaid, shall be in insolvent circumstances, may at any time apply by petition to the court for the relief of insolvent debtors within the presidency where such insolvent debtor shall then be, for the benefit of the provisions of this act," &c.; "and, if any such *person* as aforesaid shall be *jointly* indebted, it shall be lawful for *them* to apply *jointly* by petition, in such manner as is hereinbefore mentioned, and *under such joint petition the joint estate and the separate estates of such petitioners shall be dealt with and distributed.*" That section clearly gives power to the court to pass by the vesting-order the separate property of each partner. The vesting order in question purports to be made "in the matter of the petition of Robert Joseph Carbery and Annie Carbery, spinster, lately carrying on trade and business as milliners and dress-makers and traders under the name or style of Annie Carbery, and the said Robert Joseph Carbery, also for some time carrying on business **as an oil-merchants and* [*9] traders." There is some ambiguity about the heading: but it is manifest that where "oil-merchants" appears in the plural, the singular number was meant, and this is cured by the interpretation clause.(a) The two were partners in the millinery trade, and Robert

(a) Section 92, which enacts that "words describing the petition of any insolvent shall include the joint petition of two or more insolvents, and all provisions as to the one shall apply to the other; and words importing the singular number only shall be understood to include several matters as well as one matter, and several persons as well as one person," &c.

Joseph Carbery carried on business alone as an oil-merchant. Then, the operative words of the vesting order, which profess to convey to the assignee all the effects of the two and all debts due and growing due to them, seem to me sufficient to pass not only the joint property of the two but also the separate property of each. The words being capable of being so construed, I think we are justified in so construing them, in order to give effect to the proceedings. The approver, therefore, will be entitled to a verdict for the amount of the debt attached in the hands of the garnishees.

The rest of the court concurring,

Rule absolute.

*10] *EDWARD NORRIS, Appellant; JOHN CARRINGTON,
Respondent. Feb. 4.

The court cannot entertain an appeal from a county court, where the condition of giving security for the costs of appeal (or, for the amount of the judgment, in the case of a defendant,) imposed by the 14th section of the 13 & 14 Vict. c. 61, has not been strictly complied with.

THIS was an appeal against a decision of the judge of the Montgomeryshire county court. The case was heard on the 14th of September, 1863, when a verdict was found for the plaintiff. The defendant gave notice of appeal, but he failed to comply with the 14th section of the 13 & 14 Vict. c. 61, his deposit to answer the costs of the appeal not having been made until the 3d of October. This fact appearing from a statement appended to the case by the judge,

Manisty, Q. C., for the respondent, submitted that the appellant was not entitled to be heard. The 14th section of the 13 & 14 Vict. c. 61, which gives the right to appeal, gives it subject to a condition,—“provided that such party shall, *within ten days* after such determination or direction, give notice of such appeal to the other party or his attorney, and also give security, to be approved by the clerk [registrar] of the court, for the costs of the appeal, whatever be the event of the appeal, and for the amount of the judgment if he be defendant and the appeal be dismissed.” The want of compliance with this condition was held by the Court of Queen’s Bench, in *Stone v. Dean*, E. B. & E. 504, to be a fatal objection.

Prideaux, contra, submitted that the statement appended to the case was entirely extra-judicial; and that the objection was one which ought to have come in a formal shape, so as to give the appellant an opportunity of answering it.

*11] *Manisty*.—The judge might and ought to have *refused to sign the case, seeing that the appeal must be fruitless.

ERLE, C. J.—The appellant must have an opportunity of answering this. Let the case stand over until the first paper-day of next term.

No rule was drawn up; but, on the case being called on in Easter Term,

Prideaux admitted that he was unable to get over the difficulty; and the appeal was dismissed, but the court declined to give the respondent costs.

Appeal dismissed.(a)

(a) See *Daniels*, app., *Charsley*, resp., 11 C. B. 739 (E. C. L. R. vol. 73). And see *Peacock*, app., *The Queen*, resp., 4 C. B. N. S. 264, and the authorities there referred to.

STEPHEN PARTON, Appellant; JAMES NORMAN CROFTS,
Respondent. *Feb. 4.*

In an action for not accepting goods bought through a broker, the *cond-note*, bearing the signature of the broker, who acted for both buyer and seller, is a note or memorandum in writing of the bargain signed by a lawfully authorized agent of the buyer to satisfy the requirements of the 17th section of the Statute of Frauds.

THIS was an appeal against a decision of the judge of the Liverpool county court in an action brought to recover the sum of 50*l.* as damages for the breach of a contract of purchase of 500 tons of Scotch pig-iron. The cause was tried without a jury, on the 9th of July last. The evidence for the plaintiff was to the following effect:—

On the 25th of August, 1862, the defendant called *on Messrs. Bentley, Blain & Co., of Liverpool, brokers (introduced and [*12 accompanied by a Mr. M'Monnies), and stated that he wished to make a purchase through them of Scotch pig-iron to the extent of 2000 tons. Mr. Bentley (Mr. Blain, his partner, being present at the interview) told the plaintiff that he thought they could buy the quantity he wished; but that they would make inquiries. The defendant then asked and was told the day's prices, namely 58*s.* a ton; and he was also told that there would be an immediate deposit payable of 5*s.* a ton: in answer to which last remark he said that he was aware of the fact. Mr. Bentley added that the market that day was strong, and that the defendant, before giving instructions to purchase, had better make his own inquiries elsewhere, and return to their office after he had done so. The defendant said that it was not necessary for him to make other inquiries, as he was satisfied to leave the matter in the hands of Bentley, Blain & Co.; and he instructed Mr. Bentley to buy (and, acting on these instructions, Mr. Bentley did buy) for him 2000 tons of Scotch pig-iron, on the terms which are embodied in the contract-notes hereinafter referred to.

At the date of this conversation, Messrs. Bentley, Blain & Co. had instructions from the plaintiff to sell as his brokers 500 tons of Scotch pig-iron, his property, then lying in Glasgow. They had similar instructions from other principals with regard to further quantities of the same description of iron: their instructions extending to more than 2000 tons. Mr. Bentley explained, that, to a certain extent, his firm knew what they could do as to the sale; and that what he meant, when he told the defendant they would inquire, was, that they would inquire from their principals whether they would accept the price named: and this reference, Mr. Bentley added, applied to the whole quantity as to which they *had instructions for sale. No ques- [*13 tion was asked at the trial as to how and when this reference was had. The plaintiff lived in Liverpool.

In the course of the afternoon of the same day, Messrs. Bentley, Blain & Co. sent the defendant a letter enclosing two contract-notes for (in the whole) 2000 tons; one of such notes being for 1500 tons, and the other for the plaintiff's 500 tons, the subject-matter of this action.

The above letter and the contract-note in question were produced by the defendant, and put in evidence by the plaintiff. The letter was in these terms:—

"S. Parton, Esq.

"Dear Sir,—Enclosed please find contract-notes for 2000 tons Scotch pig-iron purchased this day on your account.

"BENTLEY, BLAIN & Co."

The contract-note was in these terms:—

"5, York Buildings, Liverpool,

"25th of August, 1862.

"Sold to S. Parton, Esq., on account of principals, five hundred tons Scotch pig-iron of good merchantable brands, three fifths No. 1 and two fifths No. 3, at fifty-seven shillings and ninepence per ton, delivered in Glasgow: payment by 5s. per ton deposit at once, and the balance of 52s. 9d. per ton in net cash in Glasgow on or before 21st November next, in buyer's option, on giving seven days' notice, against storekeepers' warrants for the delivery of the iron.

"BENTLEY, BLAIN & Co."

It was stated by Mr. Bentley that a contract-note of the same date as the above, and relating to the same 500 tons of iron, was sent by the firm to the plaintiff, for whom as well as for the defendant Messrs. *14] Bentley, Blain & Co. acted as brokers in the *transaction. That contract-note was not tendered in evidence by the plaintiff; nor had any notice to produce it been given by the defendant.

There was no further evidence of any entry or memorandum of the transaction.

The defendant did not pay the deposit according to the terms of the contract-note, but promised payment in a few days. Ultimately, however, he refused to pay such deposit or to accept the iron, delivery of which it was admitted on the trial had been duly offered. In the meantime, the market was and continued to be a falling market. It was also admitted, that, if the plaintiff were entitled to recover, he was entitled to a verdict for the amount claimed.

For the defence, the defendant was examined; and he denied that any such conversation on the 25th of August, or at any time, as that spoken to by Mr. Bentley and Mr. Blain, so far as related to himself, had occurred, or that he had given any instructions for the purchase of iron: and he added that the instructions given were by Mr. M'Monnies, and on his sole and separate account.

M'Monnies was not called.

It was objected on the part of the defendant that the documents above set out did not constitute a sufficient note or memorandum of the bargain to satisfy the 17th section of the Statute of Frauds: and, on the evidence, it was contended on his behalf that Messrs. Bentley, Blain & Co., even if their version of the facts were accepted as true, were and acted as factors, not brokers, in the transaction.

The judge found as a fact, on the evidence, that Bentley, Blain & Co. were and acted as brokers in the transaction, and that they were authorized as the defendant's agents to make the contract referred to:

*15] and he held as matter of law, that the documents set *out were sufficient to satisfy the 17th section of the Statute of Frauds. A verdict was thereupon entered for the plaintiff for 50l.

The question for the opinion of the Court of Common Pleas, was, whether upon the facts found by the judge, he was right in point of law in his determination.

Quain, for the appellant.—The simple question is, whether, in an action for not accepting goods, the *sold*-note, bearing the signature of the broker acting for both buyer and seller, is a sufficient note or memorandum in writing of the bargain signed by the party to be charged by such contract or his agent thereunto lawfully authorized, to satisfy the requirements of the 17th section of the Statute of Frauds. It is submitted that it is not. The short facts are these:—Bentley, Blain & Co., professing to act as brokers for both buyer and seller, made out bought and sold notes, the former of which they handed to the seller, the latter to the buyer, each note containing the broker's signature. The only evidence of the contract at the trial, was, the *sold*-note, which was produced by the defendant, being called for and put in by the plaintiff,—the corresponding bought-note, which was in the plaintiff's possession, not being in evidence at all. It is clear, since the case of *Sieviewright v. Archibald*, 17 Q. B. 103 (E. C. L. R. vol. 79), that the bought and sold-notes are to be considered as constituting the contract, and that, if there be any variance between them, there is no sufficient contract within the Statute of Frauds. In *Hawes v. Forster*, 1 M. & Rob. 368, in an action by the vendee against the vendor for non-delivery of oil pursuant to a contract made through a broker, the plaintiffs produced the bought-note which had been handed to them by the broker, without calling for the *sold-note; and Lord Denman [*16 said,—“I am of opinion that the plaintiffs have proved a contract, by producing the bought-note signed by Mr. Wright, and showing that person to have been the agent engaged by the defendants to dispose of the oil. It is not shown that the sold-note delivered to the defendants differed from the bought-note delivered to the plaintiffs: had that been shown to be the case, it would have been very material; but, in the absence of all proof of that nature, I am clearly of opinion that I must look to the bought-note, and to that alone, as the evidence of the terms of the contract.” Here, however, precisely the reverse was done: the plaintiff called for the note which was in the defendant's possession, without producing that which was in his own. *Hawes v. Forster* is thus explained by Patteson, J., in *Sieviewright v. Archibald*, 17 Q. B. 117 (E. C. L. R. vol. 79),—“If the bought and sold-notes together be the memorandum, and they differ materially, it is plain that there is no memorandum. If, on the other hand, one only of these notes is to be considered as the memorandum in writing signed by the defendant's agent and binding the defendant, which of them is to be so considered, the bought-note delivered to the defendant himself, or the sold-note delivered to the plaintiff? I have already stated that I cannot think that either of them by itself can be so treated. In no one of the cases has the court, or a judge at nisi prius, held that it could: all that Lord Denman held, in *Hawes v. Forster*, on the first trial, was, that proof of one was sufficient, without notice to produce the other, thereby holding only that the other must be taken to correspond with that produced, until the opposite party produced the other and showed the variance. In *Cowie v. Remfry*, 5 Moore's P. C. 232, C. & Co. and H. & Co. were merchants at Calcutta. H. & Co. sold to C. & Co. a large quantity of indigo, *through the medium [*17 of a broker, who drew up a sold-note addressed to H. & Co. and submitted it to H. for his approval, when H. having objected to a

particular word remaining, the broker took the sold-note to C., and informed him of H.'s objection. C. struck his pen through the word objected to by H., placing his initials over that erasure, and returned it to the broker, who thereupon delivered it, so altered, to H. & Co. The broker delivered to C. & Co. on the following day a bought-note, which differed in certain material terms from the sold-note. In an action brought by H. & Co. against C. & Co. for non-performance of the contract contained in the sold-note, the supreme court at Calcutta was of opinion that the sold-note alone formed the contract, and found for the plaintiffs. Upon appeal, it was held by the judicial committee,—reversing such finding,—that the transaction was one of bought and sold-notes, and that the circumstances attending C.'s alteration of the sold-note and affixing his initials, were not sufficient to make that note alone a binding contract; and that, there being a material variance in the terms of the bought-note with the sold-note, they together did not constitute a binding contract. [WILLES, J.—Lord Kingsdown was not an assenting party to that judgment.] In *Sievwright v. Archibald*, 17 Q. B. 115 (E. C. L. R. vol. 79). Patteson, J., says: "The bought-note is delivered to the buyer, the defendant: the sold-note to the seller, the plaintiff: each of them in the language used purports to be a representation by the broker to the person to whom it is delivered, of what he the broker has done as agent for that person. Surely, the bought-note delivered to the buyer cannot be said to be the memorandum of the contract signed by the buyer's agent in order that he may be bound thereby; for, then it would have been delivered to the *18] seller, and not to the buyer; and vice versâ as to the *sold-note. Can, then, the sold-note delivered to the seller be treated as the memorandum signed by the agent of the buyer, and binding him the buyer thereby? The very language of it shows that it cannot." And Lord Campbell says,—p. 125: "Being authorized by the one to sell and the other to buy, in the terms of the contract, when he has reduced it into writing and signed it as their common agent, it binds them both, according to the Statute of Frauds, as if both had signed it with their own hands: the duty of the broker requires him to do so; and, till recent times, this duty was scrupulously performed by every broker. What are called the bought and sold-notes were sent by him to his principals by way of information that he had acted upon their instructions, but not as the actual contract which was to be binding upon them. This clearly appears from the practice still followed of sending the bought-note to the buyer, and the sold-note to the seller; whereas, if these notes had been meant to constitute the contract, the bought-note would be put into the hands of the seller, and the sold-note into the hands of the buyer, that each might have the engagement of the other party, and not his own. But the broker, to save himself trouble, now omits to enter and sign any contract in his book, and still sends the bought and sold-notes as before. If these agree, they are held to constitute a binding contract: if there be any material variance between them, they are both nullities, and there is no binding contract. The last proposition, though combated by the plaintiff's counsel, has been laid down and acted upon in such a long series of cases that I could not venture to contravene it, if I did not assent to it." Upon these

authorities it is submitted that the note produced was not a sufficient memorandum of the contract to satisfy the Statute of Frauds.

**C. Russell*, for the respondent.—All that the statute requires, [*19 is, that there shall be some evidence of the contract in writing signed by the party to be charged or by a duly authorized agent. *Sieviewright v. Archibald* does not sustain the proposition for which it was cited. There being two sets of memoranda there which together constituted the contract between the parties, the court held, that, as there was a material difference between the two, there was no evidence to show what the contract in fact was. *Cowie v. Remfry*, 5 Moore's P. C. 232, is to the same effect. The only case in which this point has been decided, is *Hawes v. Forster*, 1 M. & Rob. 368, the effect of which is not quite accurately given in the judgment of Patteson, J., in *Sieviewright v. Archibald*. In *Hawes v. Forster* the plaintiffs sued the defendants for non-delivery of oil, and, in order to prove the contract, they put in the bought-note signed by the broker, and proved that the latter was employed by the defendants to sell the oil. On the part of the defendants it was objected that there was no evidence of a binding contract between the parties without producing the two instruments (the bought and sold-notes) and showing their correspondence with each other. But Lord Denman said: "I am of opinion that the plaintiffs have proved a contract, by producing the bought-note signed by Mr. Wright, and showing that person to have been the agent engaged by the defendants to dispose of the oil. It is not shown that the sold-note delivered to the defendants differed from the bought-note delivered to the plaintiffs: had that been shown to be the case, it would have been very material: but, in the absence of all proof of that nature, I am clearly of opinion that I must look to the bought-note, and to that alone, as the evidence of the terms of the contract." On the second occasion the ruling was, in conformity with the *finding of the custom by the jury, that the bought and [*20 sold-notes, and not the entry in the broker's book, constituted the contract,—not that it was essential to produce both. There was no evidence here that the notes differed: they must be assumed, therefore, to have corresponded in all respects. Then it is said that the note which was put in, viz. the *sold*-note, was not signed by the broker as agent for the defendant. It is immaterial, however, with what intention the signature is put: it is enough, to satisfy the requirements of the statute, if the name appears upon the face of the document, and is put there by a person duly authorized,—*Schneider v. Norris*, 2 M. & Selw. 286; *Sarl v. Bourdillon*, 1 C. B. N. S. 188 (E. C. L. R. vol. 87); or if the act of the agent is subsequently ratified by his principal: *Macleane v. Dunn*, 4 Bingh. 722 (E. C. L. R. vol. 13), 1 M. & P. 761.

Quain, in reply.—The explanation given by Patteson, J. (17 Q. B. 116) of the case of *Hawes v. Forster*, shows that that case is no authority against the appellant on the present occasion. "On the first trial of that case," he says, "Lord Denman held that the bought-note, produced by the buyer (the plaintiff), was sufficient, and was the proper evidence of the contract, and not the book, and that no notice to produce the sold-note need be given to the defendant. The court on motion granted a new trial, holding that this evidence was not the proper evidence of the contract, unless there was a custom of trade in

London that the bought and sold-notes, and not the signed broker's book, were the contract, and considering that such contract had not been sufficiently inquired into. The case is so explained by Parke, B., in *Thornton v. Charles*, 9 M. & W. 802, and again in *Pitts v. Beckett*, 13 M. & W. 743, 746: and my own note of the case (I having *21] been a member of the court which granted *the new trial) is in entire conformity with that explanation. On the new trial, the jury found the custom that the bought and sold-notes constituted the contract, and not the broker's book.

ERLE, C. J.—I am of opinion that the decision of the judge of the county court was right. This was an action by a seller against a buyer for not accepting goods sold. It is clear from the statement of facts submitted to us, that the brokers were employed by both buyer and seller,—by the seller to sell, and by the buyer to buy for him; that the terms were arranged by them as the common agents for both parties, and were communicated to them. The question which we have to decide, is, whether the requirements of the Statute of Frauds have been complied with by the memorandum in writing which was produced. I make a distinction between the contract and the memorandum of the contract: the latter may be made long after the terms have been agreed to; and the making of the one is entirely distinct from the other. That which the plaintiff here produced, was, a memorandum signed by the brokers, who were agents for both parties, that the iron had been sold on a given day upon certain terms. Mr. Quain insists that the delivery of the sold-note to the buyer is not according to the usual course; and that the only evidence of the contract is the bought and sold-notes, not the note which was produced. I am, however, of opinion that the objection is unfounded, and that the memorandum which was produced is a complete memorandum of the contract, containing the quantity, quality, price, and time and mode of payment. It is said that the *sale*-note does not contain the terms of a purchase. But it is impossible that there can be a sale without a *22] purchase: the relation of buyer and seller can only exist *where there are two parties to the bargain. It is impossible to say that the document in question is not a memorandum that the defendant contracted to buy the iron therein described. If, instead of being signed by the agents, it had been signed by the defendant himself, could it have been contended for a moment that it was not a sufficient memorandum of the contract to satisfy the Statute of Frauds? In *Sievwright v. Archibald*, 17 Q. B. 103, the bought and sold-notes differed, and so the evidence of the contract failed. Here, the sold-note only was produced, and there was nothing to impeach it. That distinguishes the two cases. To satisfy the 17th section of the statute, it is enough to produce a memorandum of the contract signed by the party to be charged thereby, or by an agent thereunto duly authorized. I think the county court judge came to a right conclusion.

WILLIAMS, J.—I am of the same opinion. It appears from the evidence transmitted to us by the learned judge of the county court, that Bentley, Blain & Co. were constituted by the defendants his agents to purchase iron for him upon certain terms, that they communicated the terms to the plaintiff, and that the plaintiff accepted those terms. If the Statute of Frauds had never been passed, this

would have been a plain case of a purchase of the iron upon the terms contained in the note produced: and the question is whether there is anything in the statute which prevents it having that effect. I am of opinion that there is not. I agree, therefore, with my Lord, that the sold-note signed by Bentley, Blain & Co. as the agent of the defendant, was a sufficient note or memorandum of the bargain signed by an authorized agent of the party to be charged; and that consequently the decision of the county court judge was right.

*My Brother Keating, who has gone to Chambers, desired [•23 me to say that he concurs with us.

WILLES, J.—I am of the same opinion. When it is found that the brokers were the agents of both parties, it is the same as if the signature had been in the handwriting of the principal himself. As to the other point made by Mr. Quain, though a point which could not have arisen but for the Statute of Frauds, it is not one to be decided upon the statute. It is said that the bought and sold-notes together constitute the contract between the parties, and that both should be produced. If in ordinary practice these expressed different things, I should agree with Mr. Quain that both must be produced. But it is well known that in practice the one is a copy of the other. It is the duty of the common agent of both buyer and seller (where one broker only is employed) to send each a copy: and, in the absence of evidence to the contrary, it is not too much to assume that the agent has done his duty. For these reasons, I am disposed to agree with what was done by Lord Denman upon the first trial of the case of *Hawes v. Forster*, 1 M. & Rob. 368, where, one of the notes only having been put in, he assumed that to be a true representation of the contract between the parties. And, when I read the judgment of Patteson, J., in *Sievwright v. Archibald*, and recollect the accuracy of language ordinarily used by that very learned judge, I cannot doubt that in his opinion the contract would have been well proved by the production of one of the notes, in the absence of proof that the other contained different terms. The judgment must be affirmed, and with costs.

Judgment affirmed.

*24] *JOHN CLARK, Appellant; GEORGE AUGUSTUS FULLER, Respondent. *Feb. 4.*

The plaintiff advertised a house to be let, referring for particulars to E., a house-agent. The defendant called upon E. and proposed to take the house from the following Michaelmas-day at a certain rent, and wrote down a specification of alterations and repairs which he would require to have done; and E., with his assent, wrote to the plaintiff, communicating to him the defendant's proposal, with a copy of the specification of repairs, and telling him that he had already set about doing them.

In an action brought in a county-court for a year's rent, or for the breach of the contract, the above letter was tendered in evidence on the part of the plaintiff, but was rejected by the judge; and the plaintiff was nonsuited.

On appeal to this court, pursuant to the 14th section of the 13 & 14 Vict. c. 61,—Held, that the letter was properly rejected; and that, assuming it was admissible as a letter written and signed by an agent duly authorized for that purpose by the defendant, it was not such a memorandum of the bargain as to satisfy the 4th section of the Statute of Frauds, inasmuch as it was a mere proposal, and did not specify the commencement or the duration of the term, so as to amount to evidence of a contract.

AN action was brought by the appellant against the respondent in the county court for Shropshire, holden at Shrewsbury, to recover the sum of 40*l.* The following is a copy of the plaintiff's particulars of demand:—

"The said John Clarke sues the said George Augustus Fuller, for that in or about the month of August now last past,(a) the defendant contracted and agreed with the plaintiff to take, and the plaintiff agreed to let, a certain messuage or dwelling-house belonging to the plaintiff, situate in the town of Shrewsbury, for the term of one year, at the annual rent of 40*l.*, provided certain repairs were done and executed by the plaintiff in and about the said messuage: and the plaintiff has done and executed all such repairs, and performed all things on his part required to be performed to entitle him to have the said agreement carried out by the defendant, but the defendant hath wholly failed so to do, whereby the plaintiff hath been and is much damaged; and the plaintiff claims 40*l.*"

At the hearing, one Williams was called in support of the plaintiff's case, and proved that he was a clerk in the employ of one Edwards, an auctioneer, in practice at Shrewsbury; and that, in August last,(a) *25] the *defendant called at Edwards's office, accompanied by one Perring, and stated that he had seen an advertisement inserted by Edwards in the local papers relative to the letting of a house belonging to the plaintiff, and asked for the keys, to look at the premises. Williams thereupon gave the defendant the keys, and he and Perring went over the house. On their return, the defendant said he liked the house very much, and he would take it if certain repairs were done. Williams said "he would tell Mr. Edwards, and he would write Mr. Clarke; and that he (Williams) would communicate the result to Perring." The defendant said, "Very well."

About a fortnight afterwards, Williams met Perring in Shrewsbury, and told him the repairs should be done. Perring promised to inform the defendant. Afterwards, on the 27th of August, the defendant again called at Edwards's office, asked for the keys, and had them for the purpose of going over the house. When he came back he said the house suited him very well, and he would take it then and there.

(a) Meaning August, 1862.

Edwards was also present. The defendant said there were certain repairs he should require done, which he would then specify, and he accordingly wrote in pencil and signed a list, of which the following is a copy :—

“1st floor. Large room papered and painted, and cupboard taken away so as to leave the recess.

“Adjoining room and small room to be made into one, by knocking down the greater portion of the partition wall. The whole room to be papered and painted, and ceiling and floor made good. Window looking into the street to have thick glass; the bottom sash to be opaque.

“2d floor. All three rooms to be papered, painted, and ceilings looked to.

“3d floor. All four rooms to be papered and *painted, ceilings made good, and skirting-board placed round the bottom [*26 of the walls: floor made good.

“Kitchen grate made thoroughly serviceable, and offices thoroughly cleaned.

“Staircase painted. Water-closet put in proper repair, and walls painted. Railings to be boarded inside. Garden done up. Bells, &c., made good.

“Outside to be painted.

“G. AUGUST. FULLER, Bangor, surveyor.”

The defendant also said he should like to have the repairs done a week before Michaelmas, that he might enter at Michaelmas. Edwards promised they should be done at once. Edwards said he would write to Mr. Clark, and he had no doubt Mr. Clarke would accede to the proposition, and accept the defendant as tenant. The defendant said “Do so.”

On the 1st of September, the defendant again called, and told Williams he had found out that a malthouse adjoined the house; and he should object to it on that account; and would be glad if Williams would make some inquiries respecting it, and meet him at the George. Williams accordingly did make inquiries, and went to the George; but, not seeing the defendant, the following correspondence took place :—

Williams to the defendant :—

“St. John’s Hill, Shrewsbury,
“1st Sept., 1862.

“Sir,—I have made inquiries respecting the malthouse to which you referred this morning, and I find both from past tenants and present neighbours, that it does not in the least interfere with the comfort of the adjoining establishment. Mr. Buttriss (the maltster) himself informs me that he uses it principally as a store-room or malthouse, having two distilleries in town where the malt is made; and that the room *which contains the malt is separated from the house by [*27 another room of ten feet in width. No unpleasant effluvia escape, as malt is not made there.

“S. F. WILLIAMS.”

Defendant to Fuller :—

“Rhyl, Sept. 1st, 1862.

“Sir,—I have been waiting to hear from you regarding Mr. Clarke’s

house, before finally settling to take it: but, on visiting Shrewsbury to-day, I found you had commenced to put it in repair. If this is on my account solely, you have acted rather prematurely, as I distinctly stated that you were to let me know whether Mr. Clarke would consent to do all that I wished, and then I intended Mrs. Fuller to see the house before I decided. From my description, however, she objects to the house, and therefore I cannot decide to take it at present. So, of course you need not keep it for me, should you have an opportunity of letting it. I cannot say, however, whether I may not eventually wish to take it, should it remain unlet.

"G. AUGUST. FULLER."

Williams to the defendant:—

"2d Sept. 1862.

"Sir,—We were somewhat surprised at the contents of your note received this morning; particularly as you had not waited to hear the result of our inquiries respecting the malthouse, to which Mrs. Fuller objects. Our note of yesterday will have informed you on that head. I beg to remind you that you agreed to take the house on condition that the repairs should be done, which matter was not left in an indefinite state, but it was distinctly stated, both to Mr. Perring and yourself, that it should be attended to at once, as you expressed a wish to enter the house before Michaelmas-Day; where-
*28] upon you gave us written instructions as to the *details of the repairs, and yesterday we informed you they were being done. The expense is therefore incurred, and we shall consider you responsible, and expect you to enter the house on the 29th day of September next, as you promised.

"S. F. WILLIAMS."

Defendant to Williams:—

"Rhyl, Sept. 3d, 1862.

"Sir,—You are mistaken in the idea expressed in your letter received this morning about any positive agreement on my part to take the house in question. The list of requirements I gave you in pencil was not an instruction, of which you must be well aware; and I am quite satisfied that I am not legally committed to take the house. I made inquiries about the adjoining malt-store; and, as the information I gained was not to my satisfaction, I concluded to try and get something else. Your letter of the first instant, however, stating that malt is not made there, but merely stored, has again altered my mind; and I now again wish to take it, provided everything is made satisfactorily; but a wish or intention is not an accomplished fact: and I shall not consider anything settled until there is a proper written agreement as to the time for which I may take, and the rent, &c. I repeat, that, as it is the most suitable house I have met with, I certainly should like to take it. As you are papering, if I take the house, I should like to have some choice of papers, as there are one or two colours I object to; such as green. I should also like a light paper for the large room on the first landing as you enter the house, and a warm-coloured paper for the other room, where the partition is to be taken down. I think of running over to Shrewsbury again next Saturday, and could then choose if you would let me see one or two patterns.

"G. AUGUST. FULLER."

*Williams to the defendant:—

[*29
"St. John's Hill, Shrewsbury,
"4th Sept. 1862.

"Sir,—Yours of yesterday is to hand. The tenancy agreement shall be prepared to be signed by both parties. It shall be drawn for whatever term you propose, at the yearly rent of 40*l.* exclusive of all taxes, as stated to you personally. The paper is now at the house awaiting your selecting; and we again repeat for the twentieth time, that your instructions as to repairs shall be literally carried out. The partition-wall is down, the ceilings attended to, and both the inside and outside work will be completed about the 18th instant, ready for the commencement of your tenancy on Michaelmas-day.

"S. F. WILLIAMS."

On Monday, the 8th of September, the defendant came again with Perring, and said he objected to enter the house, and considered he had not incurred any liability. Williams said he (the defendant) had taken the house, and that he would be held responsible for the rent until a proper notice to quit had been given; that Edwards's remuneration depended on the letting of the house; and that would be paid by the plaintiff.

Edwards employed the men to do the repairs specified by the defendant. The defendant went to the house whilst the men were doing the work; and the men said that he (defendant) told them that he had taken the house. The following letters were also put in evidence:—

Williams to the defendant:—

"St. John's Hill, Shrewsbury,
"10th September, 1862.

"Re Town Walls house.

"Sir,—I deem it my duty to inform you that I am having this house put thoroughly into order, pursuant to *your instructions. You must know that you have taken the house to all intents and purposes. When you first introduced yourself and your business, you said that you had decided upon taking the house. Your next question was, would I put it in repair. I said I would. You then pencilled down your requirements, and I at once put the business in hand. The several papers now await your inspection, that you might have your choice both in quality and colour and pattern. The house will be ready for your service one week before quarter-day; and everything will be done to suit your taste and convenience. Now, to prevent any misunderstanding between you and Mr. Clarke, the proprietor, permit me to say that you will be held as tenant from year to year, until the said tenancy is determined. [*30

"THOS. EDWARDS."

Defendant to Williams:—

"Rhyl, September 13th, 1862.

"Sir,—In reply to your letter of the 10th instant, I have only to remark that I never took the house in question, and certainly do not now intend to take it. It would appear that you view the matter in a different light; but I have yet to learn that you have the power of ordering my affairs as set forth in the latter part of your letter hereinbefore referred to.

"G. AUGUST. FULLER."

Mr. Thomas Edwards was then called, and proved that he first had communication with the defendant on the 27th of August, when he called at Edwards's office and said he had been looking at the house, and he had made up his mind to take it, subject to its being put into repair. Edwards replied that he (defendant) had better write to him (Edwards), and that he would communicate with Mr. Clarke. Defendant *31] said time was of great importance to him, as he wanted *to enter as soon as they could get the house ready for him; and that, if Edwards would give him a sheet of paper, he would write down what he required done. Defendant then wrote and signed a memorandum of repairs set out in Williams's evidence. Edwards said the repairs should be done, and that he would set about them at once; and that, to make the thing complete, as there was a wall mentioned, he would communicate with Mr. Clarke. Defendant said "Do so." Defendant said he should like to have the house ready one week previous to quarter-day: and inquired whether it would make any difference. Defendant also said, if Mr. Clarke would consent to put two rooms into one, and put the house into a nice state of repair, he should like to occupy it for a long term. Edwards replied that he would write to Mr. Clarke about the wall, and send the list of repairs. Defendant said, "Do so, and lose no time."

The plaintiff's counsel then tendered in evidence the letter written by Mr. Edwards to Mr. Clarke,—of which the following is a copy:—

"St. John's Hill, Shrewsbury,

"August 27th, 1862.

"Dear Sir,—I have at length let Town Walls house, subject to certain alterations and repairs, at 40*l.* per annum.

"A list of the said repairs I herewith send you. I think they are so absolutely necessary and reasonable that I have at once set Mr. Bowyer, the painter, upon the work, so as to bind the person who has taken it.

"Our respected friend Mr. Perring introduced the gentleman, and speaks of him in the highest terms. The name of the gentleman who will take (subject to all the repairs being done, and which I have promised him shall be done) is 'G. A. Fuller, Esq.' surveyor to the *32] post-offices. His appointment is permanent; and *he will make you a first class tenant. When the repairs are done, I will draw up a lease of possession, and take a full list of particulars.

"THOMAS EDWARDS."

This letter was objected to by the defendant's counsel; and the judge decided that it was not admissible in evidence, on the ground that the evidence did not show that Edwards was the properly-constituted agent to make the contract, but merely to make inquiries; and, in consequence of such decision, the plaintiff elected to be nonsuited.

The question for the court is, whether the judge was right in so rejecting the letter of the 27th of August.

Powell, Q. C., for the appellant.(a)—The plaintiff having a house to

(a) The points marked for argument on the part of the appellant were as follows:—

"1. That the letter of the 27th of August, 1862, was properly admissible in evidence, and ought to have been received:

"2. That the said letter, being written with the knowledge and at the wish of the defendant, was legally evidence in the cause for the plaintiff:

"3. That, from the evidence and facts as stated in the case, Edwards was and acted as the agent of the defendant in writing and sending the said letter:

let, advertised for a tenant, referring for particulars to Edwards, a house-agent. The defendant having seen the advertisement, called upon Edwards; and, after some conversation, in the course of which the amount of rent was mentioned, the defendant made a memorandum *33] of certain alterations *and repairs which he wished to have done, so that he might take possession before the following Michaelmas Day: and Edwards at his request sent a copy to the plaintiff, informing him that he had already commenced the required repairs. The question is, whether this letter so written by Edwards at the request of the defendant was not admissible in evidence against the latter for the purpose of showing a note or memorandum of the contract signed by a duly authorized agent, to satisfy the requirements of the Statute of Frauds. It is submitted that it was admissible, on the ground that it was written by Edwards by the authority of the defendant. [ERLE, C. J.—Assuming it to be admissible, what does it amount to? Does it show a contract of tenancy?] It is submitted that it contains all the requisites to bind the defendant within the 4th section. It has all the elements of a contract,—the rent, the parties, the term. [ERLE, C. J.—From what day to what day?] From the then present time. [ERLE, C. J.—It does not express that; and the parties evidently did not mean that.] It was not necessary that the precise day of the commencement of the tenancy should be stated. In the absence of mention of any specific period for the beginning of the tenancy, it must be taken to commence from the time of making the contract, or at all events from the next usual period for the commencement of a tenancy. [WILLES, J., referred to *Fitzmaurice v. Bayley*, 6 Ellis & B. 868. There, the defendant employed one Rearden, as his agent, to agree with the plaintiff for the purchase of the plaintiff's leasehold interest in a house. The plaintiff also held a stable under a demise distinct from that under which he held the house. The defendant did not authorize Rearden to purchase the lease of the stable; and Rearden represented to the defendant that he had purchased the lease of the *34] *house only: but in fact Rearden had taken from the plaintiff an agreement in writing for the purchase of both, in which was also the following clause,—“I further agree to let to” the defendant the stable “for the same rent and subject to the same conditions that I hold them myself.” Afterwards, upon the plaintiff stating to the defendant that such was the agreement, and requiring the defendant to take the stable, the defendant wrote and signed a letter to the plaintiff, stating that he did not know what Rearden had agreed to, but must support him in all he had done for him. The Court of Queen's Bench (Crompton, J., dissenting) held that this was a ratification of Rearden's agreement, whatever it might be, sufficient to constitute with it a signed memorandum under the 4th section of the Statute of Frauds, to charge the defendant with a contract to take the whole. The case afterwards went to the Exchequer Chamber, who reversed the decision of the Queen's Bench,—holding that it did not appear on the face of the writing that the parties were agreed as to the term for which the sub-lease was to be, and that there was therefore either no complete

*4. That the reason assigned by the county-court judge for rejecting the said letter is wholly untenable; and that the question of Edwards's agency or not to make the contract is altogether separate and distinct from the question of the admissibility or not of the said letter.”

agreement, or, if there was a complete agreement, no sufficient memorandum of it: *Bayley v. Fitzmaurice*, 8 Ellis & B. 664 (E. C. L. R. vol. 92). The decision of the Exchequer Chamber was affirmed in the House of Lords,—Lord Campbell, C. (who had been a member of the court below) dissenting: see *Fitzmaurice v. Bayley*, 9 House of Lords Cases 78.] *Durrel v. Evans*, 1 Hurlst. & Colt. 174, comes nearer to the present case. There, the plaintiff, a hop-grower, having sent samples of his hops to his factor, the defendant went to the factor and offered to buy some at 16*l.* 16*s.* per cwt. After some negotiation between the defendant, the factor, and the plaintiff, the latter agreed to sell the hops at that price, and the factor wrote in his book, in the *35] presence of *the plaintiff and defendant, a memorandum of the bargain, in duplicate, one part of which he headed with the name of the defendant and the other part with the name of the plaintiff. The defendant requested that the date might be altered, so that by the custom of the hop trade he would have a week's more time for payment. The plaintiff consented, and the alteration was made by the factor, who tore from his book the memorandum headed with the name of the defendant, and handed it to him, and kept the counterfoil in his possession. It was held that there was evidence for the jury that the factor was the agent of both parties for the purpose of drawing a record of the contract binding on them; and that, if he were, the name of the defendant at the head of that part of the memorandum delivered to him was a sufficient signature by his agent within the 17th section of the Statute of Frauds. Crompton, J., goes very fully into the authorities. "It is sufficient," he says, "if the party signing is agent to make the signature, although there was no express idea at the time that it should be a signature within the Statute of Frauds." And, after referring to *Schneider v. Norris*, 2 M. & Selw. 286, *Graham v. Musson*, 5 N. C. 603, 7 Scott 769, *Johnson v. Dodgson*, 2 M. & W. 653, and *Bird v. Boulter*, 4 B. & Ad. 443 (E. C. L. R. vol. 24), he adds: "The cases of an auctioneer and a broker, show the principle. When a person is in such a situation, that, by the usage of trade, or the necessity of the case, he has an implied authority to make a binding contract, a signature by him is sufficient, and that applies to the case of third persons deputed to make a contract; as, in the well-known case of a broker, it may be shown by parol that the parties intended to make such a contract. If, therefore, Edwards was impliedly authorized to act as the agent of both parties, it is immaterial whether or not *36] the *defendant intended at the time to give him authority to bind him by his signature.

H. Matthews, for the respondent.(a)—The plaintiff could have no object in putting in the letter of the 27th of August, 1862, except for the purpose of satisfying the 4th section of the Statute of Frauds. Two questions arise,—first, whether Edwards was the agent of the

(a) The points marked for argument on the part of the respondent were as follows:—

"1. That the county-court judge was right in rejecting the letter dated the 27th of August, 1862, tendered in evidence on behalf of the plaintiff:

"2. That the letter in question was a letter to the plaintiff from the plaintiff's agent, written for the purpose of obtaining instructions, and was inadmissible against the defendant:

"3. That there was no evidence to show that Edwards was acting as the agent of the defendant in writing the letter in question, or that the defendant gave Edwards authority to make any contract or memorandum of a contract for the defendant."

defendant to make a contract so as to bind him,—secondly, whether the letter was such a memorandum of the bargain as amounted to a contract of tenancy. [He was stopped by the court.]

ERLE, C. J.—I am of opinion that the decision of the county-court judge was right. Upon the statement of the evidence as submitted to us, it does not appear that Edwards was the authorized agent of the defendants to make a contract for him for the hire of the house. All that passed between them was only in the nature of a treaty for a tenancy. In the letter in question, the agent is merely writing to his principal, the landlord, to inform him that he has got him an eligible tenant: it never was the understanding or intention of any of the parties that the writer of that letter should be an agent to bind the defendant. The *county-court judge, therefore, was quite right in saying that the evidence before him did not show any authority [*37 in Edwards to make a written contract on behalf of the defendant. It seems also to me to be clear that the letter is wanting in some of the particulars which are essential to constitute a contract of tenancy. It does not state when the term is to begin, or how long it is to continue, or when the rent is to be paid. It merely intimates to the landlord that the house is let, “subject to certain alterations and repairs, at 40*l.* per annum.” It is at best a mere proposal, and not a contract or evidence of a contract.

WILLIAMS, J.—I am of the same opinion. The letter of the 27th of August, 1862, was neither a contract, nor a memorandum of a contract, signed by the party to be charged thereby or by an agent thereunto duly authorized by him. Further, it does not specify the terms of the proposed letting: many of the most material terms of a contract of that sort are altogether wanting.

WILLES, J.—I am of the same opinion, and for the same reasons. One of the points marked for argument on the part of the appellant, is, that “the reason assigned by the judge for rejecting the letter is wholly untenable, and that the question of Edwards’s agency or not to make the contract is altogether separate and distinct from the question of the admissibility or not of the said letter.” That is a mistake. The letter was tendered on the part of the plaintiff to show a contract by the defendant to take the house. It proved nothing of the sort. The learned judge was quite right in rejecting it.

KEATING, J., was at Chambers.

Judgment for the respondent, with costs.

*JOHN HACKETT, Appellant; The Churchwardens and Overseers of LONG BENNINGTON, in the County of Lincoln, and JOHN WOOD ANDREWS and CYRUS ANDREWS, Respondents. *Feb.* 5. [*38

By a local enclosure act of 34 G. 3, c. 40,—reciting that A., as lay impropriator, was entitled to the great, and B., as vicar, to the small tithes,—the commissioners were empowered to set out certain lands as the value of and which should be taken as a full satisfaction and compensation for the tithes both great and small: and, out of the lands so to be set out in lieu of tithes, they were to allot thirty acres to B., and all the remainder to A., subject to the payment of a certain corn-rent (to be ascertained in the usual way), which should, with the thirty acres, in

their judgment be a fair compensation for the vicarial tithes and payments in lieu of tithes payable to the vicar,—which rent or sum of money “should be payable and paid to the vicar and his successors” quarterly, “clear of all parochial taxes, rates, dues, and assessments whatsoever :” and it was enacted that the tithes in lieu whereof the said thirty acres of land were so directed to be allotted, and such rent was to be paid, should cease and be for ever extinguished :—

Held, that the land so allotted to A. in lieu of the vicarial tithes, and so charged with such rent, was liable to be assessed to the poor-rate.

THIS was a special case stated for the opinion of the court pursuant to the 11 & 12 Vict. c. 45, s. 11, with the consent of the parties, under a judge's order :—

1. This is an appeal against an assessment for the relief of the poor of the parish of Long Bennington, in the county of Lincoln, made the 16th of July, 1863, against which assessment the appellant duly gave notice of appeal to the respondents, the churchwardens and overseers of the poor of the said parish, and John Wood Andrews and Cyrus Andrews, both of Long Bennington aforesaid, on the ground that the respondents John Wood Andrews and Cyrus Andrews were under-rated in respect of the yearly value of the house and land occupied by them in the said parish.

2. The parish of Long Bennington was enclosed under an act of the 34 G. 3, c. 40, intituled “An act for dividing, allotting, and enclosing the open fields, meadows, pastures, commonable lands, and waste grounds within the parishes of Long Bennington and Foston, in the county of Lincoln. This act was to be taken as forming part of the case and was to be referred to by either party.

3. By that act,—after reciting that Sir W. Manners, Bart., was *39] impropriator or owner of and entitled to *receive and take such tithes arising within the said parishes of Long Bennington and Foston, or customary payment in lieu thereof, as were of right due and payable to the impropriator of such parishes, and that the Rev. Robert Lock, clerk, was vicar of the vicarage of the said parishes, and as such was entitled to receive and take such tithes arising within the said parishes, or customary payment in lieu thereof, as were of right due and payable to the vicar of the said vicarage for the time being,—it was enacted that the said commissioners should, and they were thereby required, as soon after the survey therein previously mentioned should have been laid before them as conveniently might be (after setting out public drains, and public and private roads and ways, and lands for getting materials for repairing thereof, as thereinbefore was mentioned), to set out from the then residue of the lands and grounds by that act directed to be divided and enclosed, two or more plots or parcels of land in the parish of Long Bennington aforesaid, and one or more plot or parcel, plots or parcels, of land in the parish of Foston aforesaid, which in the judgment of the said commissioners should be equal in value to one fifth part of all the lands that were open and unenclosed, lying within the respective boundaries of the then open arable fields, and to one fifth part of the several ancient enclosures and homesteads within the said respective parishes that were arable, and to one eighth part of the residue of the lands and grounds (except glebe land) lying and being within the said parishes respectively subject or liable to the payment of tithes in kind, or to any modus or composition in lieu thereof; and that the lands so to be set out as aforesaid should

be deemed, taken, and considered as equal to the value of, and should be accepted in full bar, satisfaction, and compensation of and for all tithes both *great and small, and all compositions and payments [*40 in lieu of tithes, arising, renewing, or payable within the said parishes of Long Bennington and Foston (Easter offerings, mortuaries, and other surplice-fees, which were thereby reserved to the said vicar of Long Bennington and Foston only excepted): And it was thereby also enacted, that, out of the same lands so to be set out in lieu of tithes in the said parish of Long Bennington as aforesaid, the said commissioners should, and they were thereby required to, allot unto the said Robert Lock and his successors, vicars as aforesaid, two plots or parcels of land in the parish of Long Bennington aforesaid, containing together thirty acres, statute measure, five acres whereof should be situate in a place called The Green (to adjoin the turnpike-road), opposite or nearly so to the dwelling-house of John Remington, and the residue thereof at no greater distance than half a mile from the said five acres: and that all the residue of the said land to be set out for tithes as aforesaid should be allotted to the said Sir W. Manners, or his heirs, subject nevertheless to the payment of the corn-rents thereafter reserved: And the said commissioners were thereby required to ascertain what part of the said lands so to be set out for tithes as aforesaid within the said parish of Long Bennington should (with the said thirty acres thereinbefore directed to be allotted to the said Robert Lock and his successors, vicars as aforesaid), in their judgment be a fair and equitable compensation for the vicarial tithes, and other payments in lieu of tithes, arising or payable within the parish of Long Bennington aforesaid, to the said vicar of Long Bennington and Foston aforesaid, and what part of the same lands within the parish of Foston aforesaid should in their judgment be a fair and equitable compensation for the vicarial tithes and other payments in lieu of tithes *arising [*41 or payable within the parish of Foston aforesaid to the said vicar: And it was further enacted that the said vicar, in lieu of such parts or proportions of land, and of the vicarial tithes appertaining to the said vicarage, should have and be entitled as well to the said thirty acres thereinbefore directed to be allotted to him as to the corn-rents to be ascertained and paid in manner thereafter mentioned, that is to say, the said commissioners should from the London Gazette, and by such other ways and means as they should think most proper, inquire what had been the average price of good marketable wheat in the county of Lincoln during the term of twenty-one years next preceding the passing that act, and should in and by their their said award ascertain and set forth what respective quantities should in their judgment (according to such average price as aforesaid) be equal to the yearly value of the lands in each of the said respective parishes (except the said thirty acres thereinbefore directed to be allotted to the said Robert Lock), to be ascertained as the fair and equitable compensation for the vicarial tithes, and other payments in lieu of tithes, appertaining to the said vicarage; and that there should be paid and payable to the vicar of the said parishes of Long Bennington and Foston, and his successors, for ever, out of the whole of the lands thereby directed to be allotted to the said Sir W. Manners, for tithes within the parish of Long Bennington aforesaid, according to the value of

the vicarial tithes, and other payments in lieu of tithes, arising within the same parish, and appertaining to the said vicarage, such sum of money as should be equal to the value of the quantity of wheat so to be ascertained according to the average price aforesaid, and out of the whole of the lands thereby directed to be allotted to the said Sir W.

*42] Manners for tithes within the parish of Foston *aforesaid, according to the value of the vicarial tithes and other payments in lieu of tithes within the same parish, and appertaining to the said vicarage, such sum of money as should be equal to the value of the quantity of wheat so to be ascertained according to the average price aforesaid; which said respective rents or sums of money should be *payable and paid to said vicar* and his successors either at the vicarage-house in the parish of Long Bennington aforesaid, or at such other place or places within the said respective parishes, or either of them, as the vicar thereof for the time being should appoint, by four equal quarterly payments in every year, for ever, that is to say, the 25th day of December, the 25th day of March, the 24th day of June, and the 29th day of September, *clear of all parochial taxes, rates, dues, and assessments whatsoever* (and the amount of the land-tax to be paid in respect thereof to be ascertained according to the proportion in which the lands respectively charged therewith should contribute); the first payment whereof should grow due and be made on the 25th day of December next after the execution of the said award, or such earlier quarterly day of payment as the said commissioners should by any writing under their hands direct or appoint: And it was enacted that the tithes in lieu whereof the said thirty acres of land were thereinbefore directed to be allotted, and such rents were to be paid, should cease and be for ever extinguished on or before the 29th of September, or such earlier quarterly day as should next precede the first quarterly payment.

4. The commissioners accordingly by their award set out 684 acres, 2 roods, and 28 perches, in the parish of Long Bennington, being, with certain herbage also awarded to the impropiator, in their judgment equal in value to one-fifth part of all the lands that were *43] *then open and unenclosed lying within the boundaries of the then open arable fields, and to one-eighth part of all the residue of the lands and grounds lying and being within the said parish subject or liable to the payment of tithes in kind, or to any modus or composition in lieu thereof (none of the titheable parts of the ancient enclosures and homesteads being then arable), and declared that the said lands so set out, were, according to the directions of the said act, to be deemed, taken, and considered as equal to the value of, and to be accepted in full bar, satisfaction, and compensation of and for, all tithes both great and small, and all compositions and payments in lieu of tithes, arising, renewing, or payable within the said parish of Long Bennington (Easter-offerings, mortuaries, and surplice-fees, which were by the said act reserved to the said vicar of Long Bennington and Foston, only excepted).

5. The commissioners allotted to the vicar of the said parishes thirty acres, part of the said 684 acres, 2 roods, and 28 perches, and they awarded the residue of the said last-mentioned lands to Sir W. Manners, as impropiator, subject nevertheless to the payment of the sum

of 147*l.* 16*s.* 6*d.* by the year to the said Robert Lock and his successors, the vicars as aforesaid, as a corn-rent or yearly payment of money, to be paid by four equal quarterly payments, clear of all parochial taxes, rates, dues, and assessments whatsoever, except the land-tax; which said yearly sum of 147*l.* 16*s.* 6*d.*, together with the said thirty acres awarded to the said vicar, they declared to be in their judgment a fair and equitable compensation for the vicarial tithes and other payments in lieu of tithes appertaining to the said vicarage, arising or payable within the parish of Long Bennington aforesaid to the said vicar.

6. The commissioners further declared that 70 *quarters, 3 [*44 bushels, 4 quarts, and 1 pint, of good marketable wheat were, according to the then ascertained average price of 5*s.* 3*d.* per bushel, equal to the said yearly sum of 147*l.* 16*s.* 6*d.*; and, in further pursuance of the said act, they declared the mode in which the value of the said corn-rent should be reascertained from time to time.

7. From the making of the said award, the vicar of Long Bennington and Foston has always been assessed to the poor-rate for the parish of Long Bennington in respect of the thirty acres so awarded to him as aforesaid: but he has not of late years been assessed to the poor-rate for the parish in respect of his said corn-rent. The occupier of the land allotted to the impropiator as aforesaid has always been assessed to the said poor-rate in respect of the said land since the said award: but it cannot be ascertained whether, in estimating the rateable value of the said land, any deduction has ever been claimed or made in respect of the corn-rent so charged thereon as aforesaid.

8. The present value of the said corn-rent, ascertained by the mode prescribed by the said act, is 204*l.* 14*s.* 0*d.*

9. At the time of the coming into operation of the Union Assessment Committee Act, 1862, 25 & 26 Vict. c. 103, the land so allotted to the impropiator was in the occupation of the respondents John Wood Andrews and Cyrus Andrews, and is the land mentioned in the notice and ground of appeal already referred to.

10. In pursuance of the last-mentioned act, the churchwardens and overseers of the poor of the parish of Long Bennington made a list of all the rateable hereditaments in their parish, with the annual value thereof respectively, including therein the house and land in the occupation of the respondents John Wood *Andrews and Cyrus [*45 Andrews, which were assessed at the full annual value of the said house and land, without making any deduction or allowance in respect of the corn-rent charged on the said land by the said enclosure-act and award. The parish officers in fact valued the house and land just as if they were tithe-free and were not charged with any corn-rent.

11. The respondents John Wood Andrews and Cyrus Andrews gave to the assessment committee of the Newark Union, in which union Long Bennington is situate, and to the overseers of the parish, notice in writing that they objected to the valuation list, and claimed, that, in assessing the rateable value of the said house and land, the amount of the corn-rent which they paid to the vicar under the enclosure-act should be deducted.

12. The committee admitted the objection, and amended the val-

But I do not see that such a consequence will necessarily follow; for, the occupiers of the allotted lands, which are made tithe-free, will be rated higher on that account." [ERLE, C. J.—Is a rent-charge rateable under the statute of Elizabeth? *Poland*.—Not in terms.] An annual payment awarded to the rector or vicar, under an enclosure act, in lieu of tithes, was always held liable to be rated, in the absence of express words of exemption: *Lowndes v. Horne*, 2 W. Bl. 1252; *The King v. Boldero*, 4 B. & C. 467 (E. C. L. R. vol. 10), 6 D. & R. 557. This is a rent payable out of land substituted for the tithes. In *Chanter v. Glubb*, 9 B. & C. 479 (E. C. L. R. vol. 17), 4 M. & R. 334, A., being lessee of tithes, compounded for them with the respective occupiers, by parol agreements, under which they retained the tithes accruing on their respective lands to their own use, with the remaining nine parts, from which no severance took place. The tithes were not bargained and sold when at maturity, but the agreements were prospective, and had no reference either to any specific mode of cultivating the lands or to the amount of produce in any particular year. The composition-money was paid half-yearly. And it was held that the lessee was an *occupier of tithes* within the meaning of those words in the highway acts, and liable to be rated as such. In *The King v. The Churchwardens &c. of Great Hambleton*, 1 Ad. & E. 145 (E. C. L. R. vol. 28), an act of parliament enacted that the tithes of a parish should be held in fee by A., who was owner of part of the *50] lands in *the parish, and that all A.'s lands in the parish should be charged with an annuity payable to the vicar for the time being, who had previously enjoyed the small tithes, and who, by an agreement recited in the act, was to receive such annuity in lieu of all his vicarial dues: and it was held that the vicar was not rateable to the poor in respect of such annuity, for that the tithes were not extinguished. There were no words there exempting the annuity from the payment of tithes.

Poland, for the respondents.(a)—The question is almost concluded by the Parochial Assessment Act, 6 & 7 W. 4, c. 96, and the Union Assessment Act, 25 & 26 Vict. c. 103, the 15th section of which latter act defines "gross estimated rental" to be, "the rent at which the hereditaments might reasonably be expected to let from year to year, free of all usual tenants' rates and taxes, and tithe-commutation rent-charge, if any." It is difficult to see how this corn-rent under the local act can be anything different from the tithe-commutation rent-charge under the general act. The value of the land is diminished by the amount of the charge upon it, whichever it is. An apportionment is made in respect of the tithes great and small. The vicar is to have 30 acres of land and a corn-rent, to be ascertained in a particular way, and to be payable out of certain other lands "clear of all parochial taxes, rates, dues, and *51] assessments whatsoever." But *for these words, the vicar would be rateable in respect of this rent-charge. He is clearly

(a) The points marked for argument on the part of the respondents were as follows:—

"1. That the 'corn-rent' mentioned in the case is a 'tithe-commutation rent-charge' within the meaning of the 6 & 7 W. 4, c. 96, s. 1, and 25 & 26 Vict. c. 103, s. 15:

"2. That, in estimating the annual value of the said house and land for the purpose of rating, the amount of the corn-rent paid to the vicar in lieu of title ought to be deducted:

"3. That the rate was properly made, and ought to be confirmed."

rateable in respect of the 30 acres; and, if the rest of the vicarial tithes had been commuted for land, he would have been rateable in respect of that also. In *The King v. Joddrell*, 1 B. & Ad. 403 (E. C. L. R. vol. 20), Park, J., in delivering the judgment of the court, says: "The great point to be aimed at in every rate is equality; and, whatever is the proportion at which, according to its true rateable value, any property is rated, is the proportion in which every other property ought to be rated. The first thing upon every rate, therefore, is, to ascertain the true rateable value of every property upon which the rate is to be imposed, and next to see upon what portion of that value a rate is in fact imposed. In the case of land, the rateable value is the amount of the annual average profit or value of the land after every outgoing is paid and every proper allowance made: not, however, including the interest of capital, as the sessions have done, for that is a part of the profit. Tithe is an outgoing, and therefore the corn-rent or compensation for tithe in this case is not to be added to the amount upon which the farmer is rateable; and, in respect of that portion of the annual profit or value which consists of tithe or corn-rent, the rector is himself to be assessed." If, therefore, this is a tithe rent-charge, there is an end of the argument. Lord Denman says in *The Queen v. Lumsdaine*, 10 Ad. & E. 157, 160 (E. C. L. R. vol. 37) 2 P. & D. 219, that the object of the Parochial Assessment Act was not to introduce any new principle of rating, but to affirm that which had been already established by the decisions of the court. In *The Queen v. Capel*, 12 Ad. & E. 382 (E. C. L. R. vol. 40), 4 P. & D. 87, it was held, that, under the statute 6 & 7 W. 4, c. 96, s. 1, the vicar of a parish, receiving composition for small tithes, is to be rated on such receipt in the same way as the occupier of land; *that is, on [*52 the sum for which the same would let, free from tenants' rates and taxes and ecclesiastical dues. In *The King v. Boldero*, 4 B. & C. 467 (E. C. L. R. vol. 10), 6 D. & R. 557, Bayley, J., says: "It is perfectly clear that tithes are rateable to the poor; but this question arises upon an act passed in the 39 G. 3, extinguishing tithes in the parish of Calton, and securing to the rector a certain annual payment in lieu of them. Before that time, *Lowndes v. Horne*, 2 W. Bl. 1252, *The King v. Toms*, Dougl. 401, and *Rann v. Picking*, Cald. 196, had been determined; from which cases this principle may be collected, that if, under an enclosure act, a sum of money is given to the rector or vicar, in lieu of tithes which were rateable, that money will also be rateable, unless the liability is taken away by express words in the statute." The principle of rating anterior to the Parochial Assessment Act is also fully considered in *The King v. Adames*, 4 B. & Ad. 61 (E. C. L. R. vol. 24). In *The Queen v. Shaw*, 12 Q. B. 419 (E. C. L. R. vol. 64) the tithes were not extinguished. In *The King v. The Churchwardens &c. of Great Hambleton*, 1 Ad. & E. 145 (E. C. L. R. vol. 28), the tithes were to remain in the owner of the land, and were still rateable. It was a mere arrangement between the parties, by means of which they could not escape from the liability of being rated. The same considerations apply to the Union Assessment Act, 25 & 26 Vict. c. 103.

Cave was not called upon to reply.

ERLE, C. J.—After listening attentively to the able argument of

Mr. Poland, I have come to the conclusion, that, upon the provisions of the enclosure act of 34 G. 3, c. 40, the appellant is entitled to our judgment. It appears that, in the parish of Long Bennington, in the county of Lincoln, an enclosure took place under an act of parliament by which the commissioners were to allot *certain lands *53] to the lay impropriator and to the vicar respectively in lieu of the rectorial and vicarial tithes; and it was provided that there should also be paid to the vicar and his successors, for ever, out of the lands thereby directed to be allotted to the lay impropriator, for tithes within the parish, according to the value of the vicarial tithes arising within the parish and appertaining to the said vicarage, a certain corn-rent, to be paid quarterly "clear of all parochial taxes, rates, dues, and assessments whatsoever;" and it was enacted that the tithes in lieu whereof the said thirty acres of land was therein before directed to be allotted, and such rent was to be paid, should cease and be for ever extinguished on or before a certain day. One thing is clear, viz. that, if the statute had not provided that this corn-rent should be clear of all parochial taxes, rates, and assessments, it would have been rateable, as being a parliamentary composition in lieu of tithes, which, according to numerous decisions, would be liable to be rated, as the tithes themselves would have been. Mr. Poland has endeavoured with much force to convince us that this corn-rent bears a strong analogy to a tithe-commutation rent-charge, which is by the 69th section of the 6 & 7 W. 4, c. 71, declared to be "subject to all parliamentary, parochial, and county and other rates, charges, and assessments, in like manner as the tithes commuted for such rent-charge have heretofore been subject," and which is by the 1st section of the Parochial Assessment Act, 6 & 7 W. 4, c. 96, to be deducted by the occupier of the land, in ascertaining the net annual value at which he is to be assessed. This corn-rent is clearly a payment in lieu of tithes. The local act has exempted the vicar from liability to be rated in respect of it, and, as the appellant contends, has cast that *54] liability upon the land. I fully *admit all the cases which have held that tithes are rateable, that when let the lessee is rateable as an occupier, and that the composition in lieu of tithes was also rateable. But my judgment turns entirely upon the effect of the statute which created this corn-rent. Now, it would clearly be an unjust thing on the part of the legislature, where a large sum is to be raised by contribution among the occupiers of land in a parish, to exempt any portion of it from contributing its share to the common burthen. That would be being beneficent at the expense of the other contributors. Every exemption from a common burthen is in reality an injustice. The presumption, therefore, is strongly against the legislature doing such a thing: and, if it be possible so to construe a statute as to avoid such injustice, we ought to do so. Mr. Poland says that the legislature here intended to favour the vicar by simply exempting him from liability to be rated. But that would be giving him a boon at the expense of the rest of the occupiers. The thing to be done in the case of an enclosure, is, to give land in lieu of the tithes. Now, how was the land to be disposed of here? The whole of it,—putting aside the thirty acres,—was to go to the lay-impropriator, in lieu of both rectorial and vicarial tithes. How, then, was

the vicar to be compensated for the loss of his tithes? The commissioners are directed to ascertain what part of the entire lands set out in lieu of tithes would in their judgment be a fair and equitable compensation for the vicarial tithes; and in lieu of such portion of the land the vicar was to receive a corn-rent, to be measured and ascertained in the ordinary manner. In other words, the commissioners were to award to the vicar a money payment which should be equal to the proportion which the vicarial tithes bore to the rectorial tithes. As between the vicar and the rector and the rest of the *parish, [*55 the commissioners were bound in duty to deal with the matter in accordance with the spirit of the Tithe Commutation Act. It was probably thought better that the vicar should not be exposed to the risks and anxieties inseparable from agricultural pursuits, and to give him a money payment instead of an allotment of land. It is in effect giving the lay-rector a statutory lease of the land for ever, charged with what the commissioners should find to be a fair rack-rent in case the land had been so let. If the land had been let to the lay-rector, he would have been the occupier, and subject to all the burthens usually borne by an occupier of land; and the amount of rent is calculated with reference to those burthens. Gross injustice it would be for us to shift the burthen on the occupier of the vicarial lands, if the statute were not capable of the construction which I put upon it. But it appears to me that that is the only sensible construction of which it is susceptible; and, founding my judgment upon the words of the act, I come to the conclusion that the appellant is entitled to succeed.

WILLIAMS, J.—I am of the same opinion. I think it was not the intention of the local enclosure act to give a bounty to the vicar by exempting his tithes from liability to rates, or to deprive the parish of the benefit of the rates. The act exempts the corn-rent to be paid to the vicar from rates. But, in measuring the amount of the rent, the commissioners are to give him, not a full equivalent for the value of the land to be allotted in lieu of the vicarial tithes, but the value after deducting the rates to which he was before liable in respect of his tithes. In substance, therefore, the vicar is still chargeable with rates; for, he receives the rent which is substituted for them, minus the rates. And it is no hardship on the occupier of the vicarial *lands that they should be assessed to their full annual value. [*56 He has in effect been compensated for this in respect of the vicarial tithes, because the burthen on his land is so much the less by the amount of these rates. That being so, it follows that, if the 6 & 7 W. 4, c. 98, had never passed, he would not have had any right to claim an allowance in respect of this corn-rent: and that statute has made no difference in the principle of rating. The corn-rent is not a tithe-commutation rent-charge within the meaning or intention of the act.

WILLES, J.—I am of the same opinion. The act of 34 G. 3, c. 40, is not an act which professed to deal with rates generally; nor was it intended in any way to interfere with the general law that land and tithes are both rateable. It was thought convenient that the rent-charge to be reserved to the vicar in lieu of his tithes should be reserved to him free from rates. But that circumstance was to be

taken into consideration in estimating its amount. There was no intention to give the vicar a benefit beyond what he enjoyed before. In lieu of the vicarial tithes, the vicar gets thirty acres of land which is rateable, and a rent-charge which is not rateable. But the rates must be paid by somebody, unless it plainly appears that the statute has let them drop altogether. By whom, then, are they to be paid? The history of these acts shows by whom. One of the earliest cases on the subject is that of *Lowndes v. Horne*, 2 W. Bl. 1252, which arose upon an enclosure act of 12 G. 3, c. 5, which enacted that an allotment of common field land should be made to the rector in lieu of the tithes issuing out of the old enclosures, in the parish, or, where the owners of such old enclosures had none, or not sufficient land in the common fields to make such allotment, they should pay such *57] annual sum to the rector as the *commissioners should award, with power for the rector to distrain for the same, &c. The question was, whether the rector was liable to be assessed to the poor-rate in respect of such annual sum. The court held that he was. Mr. Justice Blackstone says: "The act does not say 'it shall issue out of the lands,' but that, in lieu of the tithes issuing out of the lands, 'the owner shall pay a sum of money,' and superadds a power of distress by way of remedy. The landowner who pays this sum is entitled to a rateable abatement for himself or tenant out of the poor-rate, in like manner as if he annually compounded for his tithes." The local act now under consideration was passed a very few years after the date of that decision: and I cannot help thinking it must have been present to the mind of the person who drew the act. The words are not, "clear of all parochial taxes," &c., but, "payable and paid to the said vicar free and clear," &c.,—showing that the burthen of the rates was intended to be cast upon the person paying the rent. The rate must be amended by increasing the rateable value of the premises in question in the manner stated in the case.

KEATING, J., had gone to Chambers before the argument was concluded.

Cave asked for costs.

Poland, for the respondents, submitted that it was not a case for costs, inasmuch as they appeared to sustain the decision of the assessment committee, and the question one reasonably admitting of doubt.

PER CURIAM.—There is nothing in the circumstances to take this case out of the ordinary rule. The appellant must have costs against the Messrs. Andrews, who are virtually the respondents.

Judgment for the appellant, with costs.

*58] *BORROWMAN and Another v. ROSSEL and Another.
Feb. 5.

To a count for not accepting petroleum pursuant to contract by bought and sold-notes, the defendants pleaded, by way of equitable defence, that the real contract was not that which was contained in the bought and sold-notes, but was a contract for 150 cases of refined petroleum to agree with a sample shown by the brokers at the time of making the contract, and that the brokers, who were acting as agents for both parties, in drawing up the contract, by mistake omitted to state therein that the sale was by sample; that the mistake was not discovered until

after the defendants had received a portion of the petroleum; that the plaintiffs were never ready and willing to deliver to the defendants any cases of petroleum as the petroleum they so agreed to sell, except a certain lot of 150 cases; that the petroleum which the plaintiffs were so ready and willing to sell in fact did not agree with the sample, but was greatly inferior thereto, and of less value; and that, as soon as the defendants discovered that fact, they refused to receive any more of it, and gave notice of such refusal to the plaintiffs:—

Held, on demurrer, that this plea afforded a good equitable defence,—inasmuch as, the full performance of the agreement having become impracticable by reason of the default of the plaintiffs, the case was not one in which a court of equity could reform the contract, or impose conditions upon the defendants.

THE first count of the declaration stated, that, on the 26th of September, 1862, the plaintiffs sold to the defendants, and the defendants bought of the plaintiffs, one hundred and fifty cases of refined petroleum, at 2s. 4d. per gallon, to be cleared and paid for in fourteen days in ready money, allowing 2½ per cent. discount: Averment, that the plaintiffs were ready and willing to do all things, and all things were done and happened and existed, and all times elapsed, necessary to entitle the plaintiffs to have the said cases of petroleum cleared and paid for according to the said contract: Breach, that, although the defendants cleared divers of the said cases of petroleum, yet they did not nor would clear the residue thereof, nor pay for the said cases of petroleum according to the said contract; and the same remained and still were wholly unpaid for.

Second plea, to the first count, that the contract in that count mentioned did not relate to any specific one hundred and fifty cases of refined petroleum; that the said contract, which contract was in writing, was contained in bought and sold-notes corresponding as to the terms of the said contract with one another, and each of them signed by certain brokers, namely, Rose, Graham & Wilson, as agents for the said plaintiffs and defendants respectively; and that the following is *a copy of the bought-note:—"London, 26th [59 December, 1862. Bought this day for Messrs. Rossel, Fehr & Co., of Messrs. Borrowman, Phillipps & Co., one hundred and fifty cases refined petroleum, at 2s. 4d. per gallon; to be cleared and paid for in fourteen days in ready money, allowing 2½ per cent. discount. Rose, Graham & Wilson, brokers:" Averment, that the plaintiffs never were ready and willing to sell to the defendants, or to enable or allow the defendants to clear, nor did they sell to the defendants, nor allow the defendants to clear, one hundred and fifty cases of *such* refined petroleum as they so agreed to sell; that the cases which the defendants cleared were not cases of *such* refined petroleum as the plaintiffs agreed to sell, and were cleared by the defendants in ignorance, and without notice, and without the means of knowing, that they were not such cases of refined petroleum as the plaintiffs thereby agreed to sell; that the plaintiffs were ready and willing to sell and allow the defendants to clear certain cases of refined petroleum as and for the said residue in the first count mentioned, and no other; and that the said cases were not cases of such refined petroleum as the plaintiffs agreed to sell.

Third plea, by way of equitable defence to the first count,—that the contract in that count mentioned did not relate to any specific one hundred and fifty cases of refined petroleum; that the said contract was in writing, and was contained in bought and sold-notes

corresponding with one another as to the terms of the said contract, and each of them signed by certain brokers, namely, Rose, Graham & Wilson, as agents for the said plaintiffs and defendants respectively; that the following is a copy of the bought-notes:—"London, 26th December, 1862. Bought this day for Messrs. Rossel, Fehr & Co., *60] of Messrs. Borrowman, Philipps & Co., one *hundred and fifty cases refined petroleum at 2s. 4d. per gallon; to be cleared and paid for in fourteen days in ready money, allowing 2½ per cent. discount. Rose, Graham & Wilson, brokers:" Averment, that the said contract was negotiated by the plaintiffs, acting by the said brokers, Rose, Graham & Wilson, as their agents in that behalf; that, just before the said contract was put in writing, and on the negotiation for the same, it was verbally agreed by and between the defendants and the plaintiffs, acting by their said agents, that the plaintiffs should sell and the defendants should buy one hundred and fifty cases of refined petroleum, to agree with a certain sample then shown by the plaintiffs, acting by their said agents, to the defendants, and in all other respects on the terms as stated in the said writing; that the said brokers were authorized by the plaintiffs and the defendants to put the said verbal contract into writing, and that the said brokers, acting for the plaintiffs and the defendants, did write out the said bought and sold-notes as and for the contract which they were so to put into writing, but by mistake omitted to state that the one hundred and fifty cases of petroleum the subject of the contract were to agree with the said sample; that, through inadvertence, the said mistake was not discovered till long after the said fourteen days had elapsed, and after the defendants had cleared the said cases which it was in the said count alleged that they did clear; that the plaintiffs were never ready and willing to sell to the defendants any one hundred and fifty cases of petroleum as the petroleum which they so agreed to sell, except a certain lot of one hundred and fifty cases; that the said one hundred and fifty cases which the plaintiffs were so ready and willing to sell in fact did not agree with the said sample, but were greatly inferior *61] thereto, and of much less *value than the value of such one hundred and fifty cases of petroleum agreeing with the said sample would have been; that, at the time when the defendants so cleared the said cases which they did clear, they had no notice or knowledge that the cases which they so cleared did not agree with the said sample; that the said residue in the first count mentioned did not agree with the said sample, and was of much less value than the value of which the same number of cases agreeing with the said sample would have been; that, so soon as they, the defendants, discovered that the cases of petroleum which the plaintiffs were so ready and willing to sell as aforesaid did not agree with the said sample, they refused any longer to be bound by the said contract and to clear and pay for the said residue, and gave to the plaintiffs notice of such their refusal; and that, under their last plea, of payment of money into court, pleaded as to 209l. 19s. 2d., parcel of the money claimed in the last count, they had paid into court the full value of the said cases which they so cleared, and the said residue had always continued and was in the plaintiffs' possession.

The plaintiffs demurred to the second and third pleas; the grounds

of demurrer stated in the margin being,—as to the second plea, “that it shows no defence for non-payment by the defendant of the price of the cases of oil which were cleared by the defendants, but only ground of cross-action,”—and, as to the third plea, “that it does not show grounds for an unconditional and perpetual injunction in a court of equity.” Joinder.

R. G. Williams, in support of the demurrer.(a)—The *main [*62 question which arises upon the second plea, is, whether the defendants, having partly had the benefit of the contract declared on, can now say that they will neither complete it nor pay for what they have had. It is clear, upon all the authorities, that, though the defendants might have refused to receive any part of the oil if not according to contract, yet, having accepted part, they must be left to a cross-action for any breach of the contract on the plaintiffs' part, or possibly may urge it as a ground for diminishing the *damages. [*63
Parke, B., in delivering the judgment of the court in *Graves v. Legg*, 9 Exch. 709, 716, says: “In the numerous cases on the subject, in which it has been laid down that the general rule is, to construe covenants and agreements to be dependent or independent according to the intent and meaning of the parties, to be collected from the instrument, and of course to the circumstances legally admissible in evidence with reference to which it is to be construed, one particular rule, well acknowledged, is, that, where a covenant or agreement goes to part of the consideration on both sides, and may be compensated in damages, it is an independent covenant or contract, and an action might be brought for the breach of it, without averring performance in the declaration, under the old system of pleading; and, under the new, the denial of such performance would be bad: and the cases of *Campbell v. Jones*, 6 T. R. 570, and *Boone v. Eyre*, 2 W. Bl. 1312, are instances of the application of the rule. But then it appears, as Mr. Serjt. Williams observes in 1 Wms. Saund. 320 d (and the Lord Chief Baron, in delivering the judgment of this court in *Ellen v. Topp*, 6 Exch. 441, adopts the observation), the reason of the decision in that and similar cases, besides the inequality of damages, seems to be, that, where a person has received part of the

(a) The points marked for argument on the part of the plaintiffs were as follows:—

“That the second plea is bad,—1. Because it only sets up matter for cross-action or deduction from the contract-price, and not of defence to this action. 2. It shows no answer to the breach for non-payment of the price or value of the cases of petroleum the plaintiffs cleared. 3. By the contract, cases of refined petroleum were sold, and it was admitted by the plea that the plaintiffs were ready to sell and allow the defendants to clear cases of refined petroleum. 4. From the declaration it appears that there was an appropriation and measurement of 150 cases of petroleum, and the acceptance by the defendants of part operated as an assent by them to such appropriation by the contract, and the defendants were bound to pay for the petroleum at the expiration of the fourteen days, whether cleared or not:

“That the third plea is bad in substance, because,—1. The matters disclosed by it do not afford grounds for an unconditional and perpetual injunction in equity. 2. A court of equity at all events would grant an unconditional and perpetual injunction only in case the value of the petroleum cleared and taken by the defendants had been paid before suit. 3. The plea does not shew any knowledge or means of knowledge on the part of the plaintiffs of the alleged verbal contract, or that there was a mistake in the written contract. 4. That the defendants, by their laches in not objecting to the contract at once, and by allowing the plaintiffs to act upon it, and acting upon it themselves, have precluded themselves from afterwards objecting to it; and their only remedy, if any, is against the brokers for not properly drawing up the contract. 5. The plea at most only shows ground for a reformation of the contract.”

consideration for which he entered into the agreement, it would be unjust, that, because he had not the whole, he should therefore be permitted to enjoy that part without either payment or doing anything for it. Therefore the law obliges him to perform the agreement on his part, leaving him to his remedy to recover any damage he may have sustained in not having received the whole consideration. Mr. Serjt. Williams goes on to observe that it must appear upon the record that the consideration was executed in part. This may appear by the instrument declared on itself, *whereby a valuable right, part
*64] of the consideration, is conveyed, as in *Campbell v. Jones* or *Boone v. Eyre*, or by averment in pleading. When that appears, it is no longer competent for the defendant to insist upon the non-performance of that which was originally a condition precedent; and this is more correctly expressed, than to say it was not a condition precedent at all." The plea is a bad plea, at all events, for not answering what was actually delivered. Another objection to this plea is, that it shows that the plaintiffs *were* ready and willing to perform the contract as set out. That would be well performed by the delivery of any 150 cases of petroleum: the word "such" can only refer to the article mentioned in the bought-note. [WILLES, J.—The plea might possibly be a good one, but for the introductory averment, which shows that the contract did not relate to any specific 150 cases.]

The third plea amounts in substance to this,—that the contract was made by brokers acting for both buyers and sellers; that, on the negotiation for the contract, it was verbally agreed between the defendants and the brokers that the oil should agree with a certain sample then produced; that, in making out the bought and sold-notes, the brokers by mistake omitted to insert therein the words "according to sample;" that the defendants did not discover the mistake until after they had received a portion of the oil; and that, having discovered it, they declined to receive any more. To constitute a good plea on equitable grounds, it must disclose facts which would induce a court of equity to grant an unqualified and unconditional injunction: it is not enough to show that it requires reforming: *Steele v. Haddock*, 10 Exch. 643; *Vorley v. Barrett*, 1 C. B. N. S. 225 (E. C. L. R. vol. 87); *Wood v. Dwarris*, 11 Exch. 493; *Perez v. Oleaga*, 11 Exch. 506; *The Solvency Mutual Guarantee Company v. Freeman*, 7 Hurlst. & N. 17.
*65] *In *Wake v. Harrop*, 6 Hurlst. & N. 768, affirmed in error, 1 Hurlst. & Colt. 202, the plea was held to be good as an equitable plea, on the ground that the facts disclosed in it showed that the defendant never could be liable upon the agreement at all. Bramwell, B., in the court below, and Willes, J., in the court of error, were of opinion that it also afforded a good answer at law. In *Scott v. Littledale*, 8 Ellis & B. 815 (E. C. L. R. vol. 92), to a declaration for non-delivery of one hundred chests of tea ex the ship S., sold by the defendant to the plaintiff at a fixed price, with the usual averments that the plaintiff was always ready and willing, &c., and that all conditions precedent were fulfilled, the defendant pleaded, for a defence on equitable grounds, that the tea was bought and sold upon a sample which the defendants believed to be a sample of the said tea ex the said ship, and that by the said contract the defendants agreed that the

tea in the said one hundred chests should be equal to the said sample; that the said sample was not a sample at all of the said one hundred chests, but was a sample of a totally different tea; that the defendants afterwards discovered that there had been a mistake respecting the said sample, and forthwith, and before the plaintiff had in any respect altered his position on account of the said contract having been made, gave notice of such mistake to the plaintiff, and that the defendant would, on account of the said mistake, treat the contract as void; and that the contract was entered into solely through the mistaken belief of both parties that the said sample was a sample of the one hundred chests, and would not have been entered into but for the said mistake. Upon demurrer to an equitable replication to this plea, it was held that the plea was bad, inasmuch as it failed to show that a court of equity would have granted a simple relief in favour of the defendants against their *liability to deliver the tea ex the ship S. "This [*66 plea," said Lord Campbell, "is founded on the assumption that in equity this contract would be void at the option of the vendor. But we are of opinion that the contract would be held to be still subsisting, and that the relief in equity, if any, would be partial or conditional. We have no authority in this court to settle such equities." [WILLIAMS, J.—What terms would a court of equity impose in this case?] It is impossible to say: but, at all events, it would give interest by way of damages for the time that the money remained unpaid. Further, it is submitted that there is no equity in the matter: all that the plaintiffs would know of the contract would be from the bought-note. In Story's Equity Jurisprudence, § 148, it is said: "Equity, as a practical system, although it will not aid immorality, does not affect to enforce mere moral duties. But its policy is, to administer relief to the vigilant, and to put all parties upon the exercise of a searching diligence." Again, § 176: "In all these cases of relief by aiding and correcting defects or mistakes in the execution of instruments and powers, the party asking relief must stand upon some equity superior to that of the party against whom he asks it. If the equities are equal, a court of equity is silent and passive."

Sir G. Honyman, contra.(a)—The plaintiffs demand to be paid for the petroleum according to the contract *price, whereas the demurrer admits that the allegations in the plea that the contract [*67

(a) The points marked for argument on the part of the defendants were as follows:—

As to the second plea,—“That the demurrer admits that neither the oil which was cleared nor the oil which was rejected was what the plaintiffs contracted to sell, and consequently that the defendants are not liable upon the contract to pay the contract-price for what they cleared, though they may be liable on a quantum meruit: That they were not bound to clear the remainder, because it was a condition precedent to the defendant's obligation to pay, that they should have got or been able to get that for which they contracted to pay; and it was a condition precedent to their obligation to clear, that there should have been that for them to clear which they contracted to clear; for that, under a contract to clear and pay for cheese, they would not have been bound to pay for chalk, nor, having in ignorance cleared chalk instead of cheese, would they have been bound to pay for the chalk as cheese.”

As to the third plea,—“That everything had been done which equity would have required the defendants to do; for that they had paid into court the value of what they cleared, and equity required them to do no more; and therefore that the injunction would be absolute; and that, if the equitable defence was not complete before the payment of the money into court, the plea was a good plea against the further maintenance of the action, as the formal commencement of *actionem non ulterius* is dispensed with by the Common Law Procedure Act of 1852.”

was not for any specific cases of petroleum, and that the petroleum which the plaintiffs were ready to deliver was not that which they contracted to deliver, are true. The plea in effect amounts to a traverse of the readiness and willingness to deliver what was contracted for. [ERLE, C. J.—If you have a plea traversing the readiness and willingness, that will avail you: if not, strike out this plea, and plead a traverse, and let the costs of the amendment be costs in the cause. [*R. G. Williams* declined to assent to this.] As to the third plea, *Ball v. Storie*, 1 Sim. & Stu. 210, is expressly in point. It was there held that a court of equity will reform an instrument which, by the mistake of the drawer, admits of a construction inconsistent with the true agreement of the parties, although the party seeking to reform it himself drew the instrument.

*68] ERLE, C. J. (stopping *Sir G. Honyman*).—This is an *action for not accepting goods pursuant to contract by bought and sold-notes. Part of the goods which were the subject of the contract had been received, but the rest refused. The third plea, which sets up a defence upon equitable grounds, states that the real contract between the parties was not that which is contained in the bought and sold-notes, but was a contract for one hundred and fifty cases of refined petroleum to agree with a sample shown by the brokers at the time of making the contract, and that the brokers, who were acting as agents for both parties, in drawing up the contract, by mistake omitted to state therein that the sale was according to sample. The plea then goes on to allege that the mistake was not discovered until after the defendants had received a portion of the petroleum, that the plaintiffs were never ready and willing to deliver to the defendants any cases of petroleum as the petroleum which they so agreed to sell, except a certain lot of one hundred and fifty cases, and that the petroleum which the plaintiffs were so ready and willing to sell in fact did not agree with the sample, but were greatly inferior thereto and of less value, and that as soon as they (the defendants) discovered that fact they refused to receive any more of it, and gave notice of such refusal to the plaintiffs. By the demurrer these allegations are admitted to be true: and the question is whether they constitute any equitable defence to the action. If the petroleum was sold according to sample, and did not correspond therewith, it is but just that the defendants should be enabled to set that up as a defence to an action founded upon the contract. It is said that an equitable defence cannot be set up whilst the contract is executory. But I am of opinion that the equitable defence may be allowed where, as here, the contract is at an end or is broken, so that it does not need reforming, and the *69] *matter may be finally disposed of here. It appears that the petroleum in question was to be according to sample, and to be cleared and paid for within fourteen days. The plea shows that it was not according to sample. The plaintiffs, therefore, have broken their contract; and the defendants have a right to say that the contract is at an end. It has been insisted, however, on the part of the plaintiffs, that a court of equity would not grant a perpetual unconditional injunction in this case, but would impose it as a term, that the defendants should pay for the oil which has actually been delivered, and, inasmuch as there has been considerable delay, the plaintiffs

would be entitled to interest. This is a very refined claim : but I do not believe it to be a true one. In order to establish it, the plaintiffs should have been prepared to show that the oil received was in accordance with the contract, so as to make it the defendants' duty to pay the contract price for it. The plea shows that it was not according to contract ; and, as the defendants had no means of investigating the matter, they are to pay for it according to its value. That being so, no interest can be due. The judgment must therefore be for the defendants on the third plea. And, as to the other plea, if the parties cannot agree that it shall be put in the usual form, we will give judgment upon it on a future occasion.

WILLIAMS, J.—I am of the same opinion. As to the equitable plea, there is no doubt, that, if the case be one in which a court of equity would only grant a qualified or conditional relief, as a court of law has no means of enforcing conditions, the equitable defence cannot be allowed. Some of the cases referred to are examples of that doctrine. But, if the court of equity were to reform this contract according to the terms of *this plea, it would be useless, because [*70 it is plain that the performance of the agreement has become impracticable by reason of the default of the plaintiffs. The court of equity, therefore, could not impose terms. It is said that at all events it would require the defendants to pay interest upon the price of that part of the goods which they have received. But it seems to me that no interest would be allowed upon this money. The plaintiffs have always insisted upon the performance of the agreement in its unreformed state. The demurrer to the third plea therefore fails.

The rest of the court concurring,

Judgment for the defendants upon the demurrer to the third plea.

The suggested amendment not having been consented to, the court now proceeded to give judgment upon the demurrer to the second plea.

WILLIAMS, J.—When this demurrer was before us upon a former occasion, it went off without being fully argued, in consequence of a suggestion thrown out by the court that the second plea should be amended by turning the traverse as it now stands into a traverse of the plaintiffs' readiness and willingness to perform the contract. Upon more fully considering the form of the plea, we were strongly inclined to think that the more appropriate course would have been for the plaintiffs, instead of demurring, to have gone to a judge at Chambers for the purpose of having the plea freed from embarrassment, under the 75th section of the Common Law Procedure Act, 1852. And we still think that the plaintiffs, if they should prefer it, should have that course open to them now, viz. to go before a judge at Chambers on summons to have the demurrer *struck out and [*71 the plea clarified. If, however, the plaintiffs do not choose to avail themselves of that suggestion, we must proceed to give judgment upon the plea as it stands. The conclusion I have come to is, that the plea is bad. I am desirous of adding that I do not ground the conclusion I have arrived at as to the invalidity of the plea, upon the fact that it amounts to an argumentative denial of the readiness and willingness averred in the declaration, but that in truth it relies, not

upon the plaintiffs' want of readiness and willingness to deliver refined petroleum according to the terms of the bought and sold-notes, but on their not being ready and willing to sell and deliver one hundred and fifty cases of refined petroleum such as they agreed to sell. The plea therefore admits that certain cases of refined petroleum were offered, but avers that it was not the thing contracted for. The real meaning of the second plea is, that the defendants rely, not upon the fact that the plaintiffs were not ready and willing to deliver refined petroleum pursuant to the contract alleged in the declaration, but upon the fact of the article they were ready and willing to deliver being deficient in some other quality which by some understanding between the parties not introduced into the bought and sold-notes it ought to have possessed.

WILLES, J.—I am of the same opinion. It is impossible to read this plea without seeing that the plaintiffs must be embarrassed by it. Upon the face of it, it is doubtful whether the defendants mean to say that the plaintiffs were not ready and willing to deliver the refined petroleum contracted for, or that there was some stipulation that they should deliver something more than "refined petroleum,"—for instance, refined petroleum from a particular district, or in *cases *72] bearing a certain mark, or what not. If the plea is susceptible of the latter meaning, it is clearly bad. All that the plaintiffs contracted by the bought and sold-notes to deliver, was, one hundred and fifty cases of refined petroleum. The contract was not for any specific thing, but for one hundred and fifty cases of an article the delivery of any one hundred and fifty cases of which of the sort described would be a fulfilment of the contract. It is admitted by the plea that the plaintiffs were ready and willing to sell and deliver to the defendants one hundred and fifty cases of refined petroleum. Construed in that sense, the plea is bad. The only word in the plea to indicate that that is not its true sense, is the word "such." That, however, is a word of doubtful meaning. It may mean of the quality which the plaintiffs agreed to sell. "Such refined petroleum as the plaintiffs so agreed to sell" seems to be put in opposition to that which they were ready and willing to deliver. Construing the plea in that sense,—which seems to me to be putting the only sensible meaning upon the word "such,"—the plea is clearly a bad one. All this is a matter of language and of logic which the plaintiffs ought not to be vexed with, and which they ought to have an opportunity of getting set right in the manner suggested by my Brother Williams.

WILLIAMS, J.—What occurs to me is this,—that possibly, if this demurrer should come to be argued in a court of error, it may be treated as mere matter of form and not of substance, and so the plaintiffs may be in jeopardy of having the plea held good. By going to Chambers, as we recommend, all embarrassment at the trial will be avoided. Both parties, in truth, would be much benefited by adopting that course.

Judgment accordingly. -

***GRELL and Another v. LEVY. Jan. 19. [*73**

An agreement (to be carried into effect in this country) which would be void on the ground of champerty if made here, is not the less void because made in a foreign country where such a contract would be legal.

Where, therefore, an attorney entered into an agreement in France, with a French subject, to sue for a debt due to the latter from a person residing here, whereby the attorney was to receive by way of recompense a moiety of the amount recovered:—Held, that, the agreement being void for champerty, the attorney was remitted to his ordinary retainer as an attorney, and the work having been done, and the client having received the benefit of it, was entitled to his costs as between attorney and client.

THIS was an action for money payable by the defendant to the plaintiffs, for money received by the defendant to the plaintiffs' use, for interest, and for money due upon accounts stated.

The defendants pleaded, amongst other pleas,—fourthly, as to so much of the declaration as was for money received by the defendant for the use of the plaintiffs, and for money found to be due from the defendant to the plaintiffs on accounts stated between them, that, before the accruing of the causes of action in the declaration mentioned, a certain person, to wit, one K. Wilhelms, was indebted to the plaintiffs, then residing in and domiciled and carrying on business in Paris, in the empire of France, beyond the seas, in a large sum of money, for goods sold and delivered by the plaintiffs to the said K. Wilhelms, and for money paid by the plaintiffs for the said K. Wilhelms, at his request, and the said K. Wilhelms being resident in England, the plaintiffs had great difficulty in recovering, and were unable to recover their said debt; and thereupon, in parts beyond the seas, to wit, in Paris, in the empire of France, it was agreed between the plaintiffs and the defendant, being an attorney of Her Majesty's superior courts at Westminster, that the defendant should at his own expense use his best endeavours to recover the said debt in England for the plaintiffs, and, if necessary, should bring an action in England against the said K. Wilhelms, at his own expense, in order to recover such debt, and that the defendant, in consideration thereof, should retain a certain portion, to wit, one half, of the amount of the said debt which he might recover for the plaintiffs *from [*74 the said K. Wilhelms as aforesaid; that the said agreement was entered into according to the laws of the said empire of France, and was according to the said laws binding and valid between the said parties; that the defendant accordingly did bring an action in England, in the name of the plaintiffs, against the said K. Wilhelms, and did receive from him a large amount of the said debt, and the defendant thereupon, and before this suit, paid to the plaintiffs one portion of the amount recovered, and did everything, and all things happened, to entitle him to retain, and he did retain, the other portion thereof, being the proper proportion to retain according to the said agreement; that the money received by the defendant to the use of the plaintiffs was the portion of money recovered which was retained by the defendant as aforesaid; and that the accounts alleged to be stated were stated of and concerning such money had and received as aforesaid.

The fifth plea set up substantially the same defence. There was also a plea of payment. Issue.

The cause was tried before Bramwell, B., at the last Summer Assizes at Croydon. The agreement set up by the fourth and fifth pleas (which was drawn in Paris, and was in the French language) was put in. The following is a translation of it:—

“The undersigned, Jules Grell & Co., merchants residing in Paris, Boulevard Sebastopol, No. 48, on the one part, and Edward Levy, solicitor, 29, Henrietta Street, Covent Garden, in London, on the other part, have agreed what follows:—We, Grell & Co., give authority to Mr. Edward Levy for us and in our name to pursue by all the forms of law the recovery of the sum of 20,640*fr.* 5*c.* which is due to us from M. Samson & Co.: consequently, to make all the necessary proceedings to obtain the recovery of the said sum, to receive the *75] amount, to give a receipt, to *restore every title and deed, to obtain an acknowledgment for them, to treat, transact, and generally do in our interest all that he may believe useful and proper, promising to acknowledge and ratify, when called upon. We resign the power of making personally any arrangement with the said M. Samson & Co., without the participation and consent of Mr. Levy, and, in case we should make any, contrary to our present engagement, we oblige ourselves to pay him in title of indemnity the sum of 10,000 francs:

“We allot to Mr. Levy, in title of expense and honorarium, the half of the sum he may recover: but it is well understood that he will have no expenses to demand from us, and that whatever he may advance, whether on his own account or that of any adversary, will be his own affair. (signed) “JULES GRELL & Co.”

“I, Edward Levy, declare that I accept these present agreements, and submit to them. (signed) “E. LEVY.”

It appeared that, in pursuance of the above agreement, which was proved to have been made in Paris, the defendant commenced an action against Wilhelms (Samson & Co.), and that, when the cause was ripe for trial, Wilhelms paid him 500*l.* for debt, and 170*l.* for costs.

Of the money thus recovered the defendant paid over to the plaintiffs 300*l.*, retaining to himself 200*l.* and the costs.(a)

The costs as between attorney and client were afterwards taxed, when the master gave the defendant an allocatur for 40*l.*

A verdict having been found for the defendant,

*76] *Montagu Chambers*, in Michaelmas Term last, *obtained a rule calling upon the defendant to show cause why judgment should not be entered for the plaintiffs on the fourth and fifth pleas non obstante veredicto, and why the verdict found for the defendant should not be set aside and a verdict entered for the plaintiffs, pursuant to leave reserved, either for 370*l.*, 260*l.*, 200*l.*, 160*l.*, or 37*l.* 10*s.*,(b) or for such other sum as the court should direct, on the grounds,—first, that the fourth and fifth pleas disclosed an illegal contract and were no answer to the action,—secondly, that none of the pleas

(a) This was the result of a subsequent agreement, made in London.

(b) A mistake for 35*l.*

were proved,—thirdly, that the defendant was not entitled to deduct from the sum of money received by him the amount of his bill of costs as an attorney in the action of *Grells v. Wilhelms*.

Leave was reserved by the rule for the defendant to move for a new trial in the event of the above rule being made absolute.

Hawkins, Q. C., Ballantine, Serjt., and Prentice, now showed cause. Admitting that the agreement in question would, if made in England, have been void for champerty,—*Re Masters*, 4 Dowl. P. C. 18; *Erle v. Hopwood*, 9 C. B. N. S. 566 (E. C. L. R. vol. 99),—that objection cannot apply here; the agreement having been entered into in a country where such agreements are not prohibited. “As a general rule, the *lex loci contractus* governs in deciding whether there was illegality in the contract:” per *Erle C. J.*, in delivering the judgment of the court in *Branley v. The South Eastern Railway Company*, 12 C. B. N. S. 63, 72 (E. C. L. R. vol. 104). The fact that the action was brought in an English court is an accident. [WILLIAMS, J.—The question is, whether we must not hold it to be an illegal thing for an officer of this court to make such a bargain.] The contract having been wholly executed on both sides, and the plaintiffs having derived a benefit under it, it is not competent to them now to *repudiate it. An illegal contract, if rescinded as to part, must be rescinded altogether: *Alexander v. Owen*, 1 T. R. 225. *Buller, J.*, in that case says,—“It would be great injustice to allow the plaintiff to recover in this action the whole value of the goods sold, because that would be permitting him to take advantage of a corrupt agreement, which is never allowed in cases where a party applies to the court to set aside such agreements. That was the principle on which the court went in the late case of *Fitzroy and Gwillin*, 1 T. R. 154, where they said, that, if a party applies to the court to rescind a contract on the ground of its illegality, it must be done in toto, and *he must not derive any advantage under it*. The parties are in *pari delicto*; and, if one of them seek relief, he must first do what is just, according to the principle established on the other side of the Hall, that he who asks equity must do equity.” So, in *Palyart v. Leckie*, 6 M. & Selw. 290, it was held that an assured upon a policy effected in terms sufficiently large to comprehend an illegal adventure, and who intends thereby to cover an illegal adventure, cannot recover back the premium, without some formal renunciation of the contract, made known to the underwriter before the bringing of the action, although the adventure is never entered upon. “I confess,” said Lord Ellenborough, “that I wish we had never departed from the plain and intelligible rule, that, where the contract is founded upon a consideration clearly illegal, neither party shall be allowed a *locus standi*, and to receive any assistance in a court of justice. This is a broad principle, which no one could well misapprehend: and we have got into some difficulty by receding from it.” Again, in *Lowry v. Bourdieu*, 2 Dougl. 468, it was held that, an insurance having been made without interest, and the premium paid, the assured could not recover back the premium *after the vessel had arrived safe. Lord Mansfield said: “This is a gaming policy, and against an act of parliament (19 G. 2, c. [*78 87], and therefore it is clear that the court will not interfere to assist either party; according to the well-known rule, that, in *pari delicto*

&c. Not that the defendant's right is better than that of the plaintiffs; but they must draw their remedy from pure fountains." [WILLES, J., referred to *Tenant v. Elliott*, 1 Bos. & P. 3.] So, as to the case of illegal wagers: after the money has been paid over, money had and received will not lie to recover it back: see the cases collected in the notes to *Merryweather v. Nixan* (8 T. R. 186), in 2 Smith's *Leading Cases*, 5th edit. p. 456. [WILLIAMS, J.—The plaintiffs show a *prima facie* case when they show the relation of attorney and client between the defendant and themselves: they do not rely upon the illegal agreement at all; it is the defendant who sets it up by his fourth and fifth pleas as an answer to their claim.] The agreement was the defendant's retainer. [WILLIAMS, J.—The action is founded upon the contract which the law implies. Suppose an agreement were made with an attorney that his costs should not be taxed, could he enforce it?] Probably not. The authorities upon this subject are also collected in Story's *Conflict of Laws*, §§ 277–285; and in Broom's *Legal Maxims*, 2d edit. pp. 643 et seq. And see *Lubbock v. Potts*, 7 East 449, and *Santos v. Illidge*, 6 C. B. N. S. 841 (E. C. L. R. vol. 95).^(a) As far as the costs are concerned, these clearly never could be money received to the use of the plaintiffs. [*Chambers* conceded this.]

Montagu Chambers, Q. C., *C. Pollock*, and *Lucius Kelly*, in support of the rule.—The agreement, though made in France, was made by *79] an English attorney *with reference to the recovery of a debt in an English court of justice. So far, therefore, as it related to the retaining of the 200*l.*, it was a void agreement. But it still remained a valid retainer of the defendant as an attorney. The fourth and fifth pleas treat the agreement as an agreement made by an English attorney in Paris, to recover money from an English trader in England. [ERLE, C. J.—You can only have judgment *non obstante veredicto* on those two pleas. Subject to the leave reserved to Mr. Hawkins, we think the plaintiff is entitled to a verdict for 160*l.*,—the entry of the findings upon the several issues to be settled at Chambers.]

Hawkins, Q. C., in pursuance of the leave reserved to him by the rule, then moved for a new trial, on the ground that the verdict was against the weight of evidence, and also upon affidavits.

ERLE, C. J.—As already intimated, I am of opinion that the plaintiff is entitled to a verdict for 160*l.* The argument that the agreement was valid because made in France is disposed of by the fact that it was to be performed in England by an officer of an English court. It was clearly an invalid and illegal agreement. Assuming, therefore, that the agreement was not illegal in the country where it was made, it becomes illegal when sought to be enforced here. The agreement being out of the way, the defendant is remitted to his ordinary rights upon his retainer as attorney for the plaintiffs: and the Master has taxed his costs irrespectively of that agreement. He has done the work, and the clients have had the benefit of it. I think the Master was quite right in allowing him his costs as upon an ordinary retainer. He was clearly entitled to the 170*l.* costs as between party and *80] party in the cause of *Grell v. Wilhelms*. He was also entitled to the 40*l.* extra costs, as between attorney and client. The

(a) Reversed, on error, 8 C. B. N. S. 861 (E. C. L. R. vol. 98.)

result will be that the plaintiffs are entitled to recover the balance of 200*l.* less the 40*l.* for extra costs, and also to judgment non obstante veredicto on the fourth and fifth pleas.

With regard to the motion for a new trial, I think there is nothing in the evidence, or in the affidavits now produced, to show that the jury came to a wrong conclusion,

WILLIAMS, J.—I am of the same opinion. According to the law of this country, the attorneys and suitors in Westminster Hall are subject to certain reciprocal duties and entitled to certain reciprocal rights. The client, on the one hand, is entitled to call upon his attorney to pay over to him all moneys which he has received for him; and the attorney, on the other hand, is entitled to hold them subject to his right to costs. We cannot allow those rights and duties to be overridden by agreements made abroad. This is an attempt to fetter the rules of our law in a manner which we cannot sanction.

The rest of the court concurring,

Rule absolute to enter a verdict for the plaintiffs for 160*l.*

*SKULL and Another v. GLENISTER and Others. [*81

A right of way appurtenant to land passes to the tenant by a parol demise of the land, though nothing is said about it at the time of the demise.

A., having a right of way to a close, demised the close to B. The latter, being possessed of an adjoining close, upon which he was erecting certain houses, used the way for carting building materials to A.'s close for the purpose of using them upon his own land:—Held, that it was properly left to the jury to say whether B.'s use of the road was a bona fide exercise of the right of way to A.'s close, or a mere colourable mode of getting to his own land.

THIS was an action of trespass. The declaration stated that the defendants, on the 20th of January, 1862, and on divers other days and times between that day and the commencement of the suit, broke and entered certain land of the plaintiffs, being land covered with water, situate and being in the parish of Chipping Wycombe, in the county of Buckingham, the same being that portion of land covered with the water of a stream running and being underneath a bridge of the plaintiffs lately erected over the said stream, and trespassed upon the said bridge, the same being a bridge connecting the high road from Chipping Wycombe aforesaid to West Wycombe, in the said county, with certain land of the plaintiffs: And also that the defendants, on the said 20th of January, 1862, and on divers other days and times between that day and the commencement of the suit, broke and entered certain land of the plaintiffs situate and being in the parish of Chipping Wycombe, in the county of Buckingham, the same being a roadway leading from the bridge in the first count mentioned to certain other land of the plaintiffs in the borough of Chipping Wycombe, and county aforesaid, and broke down, prostrated, and destroyed the walls and fences of the plaintiffs there standing and being, and cast, deposited, and threw upon the said land first in this count above mentioned divers quantities of bricks, mortar, earth, stones, and rubbish: (a) Claim, 200*l.*

The defendants pleaded,—first, not guilty,—secondly, that the plaintiffs were not possessed as alleged,—thirdly, that they committed

(a) Vide post, p. 92.

*82] the several trespasses in *the declaration mentioned, and each and every of them, by the leave and license of the plaintiffs,—fourthly, except as to the breaking down the said walls and fences, and casting and depositing the quantities of bricks, mortar, earth, stones, and rubbish, as in the declaration mentioned, that, before the committing of the said several trespasses, the plaintiffs were seised in their demesne as of fee of and in the said bridge and the said several lands in the declaration mentioned, and also of a certain other piece of land now in the possession of the defendant Daniel Glenister; and, the plaintiffs being so seised as aforesaid, theretofore, and before the committing of the said several trespasses in the declaration mentioned, to wit, on the 4th of September, 1861, by a certain indenture then made between the said plaintiffs of the one part and one Robert Wheeler and one Thomas Wheeler of the other part, they the said plaintiffs did thereby release and convey unto the said Robert Wheeler and Thomas Wheeler the said piece of land now in the possession of the defendant Daniel Glenister, *together with a right of way and passage, ingress, egress, and regress, with horses, carts, and carriages, or otherwise, upon and over the said bridge, and in, through, and over the several closes in the declaration mentioned, as belonging and appertaining to the said piece of land now in the possession of the defendant Daniel Glenister*, To have and to hold the same unto the said Robert Wheeler and Thomas Wheeler, their heirs and assigns, for ever: That, afterwards, and after the execution of the said indenture, and before the committing of the said several trespasses in the declaration mentioned, they the said Robert Wheeler and Thomas Wheeler did demise and let unto the defendant Daniel Glenister the said piece of land in the said indenture mentioned, to have and to hold the same as tenant *83] thereof from year and year *to them the said Robert Wheeler and Thomas Wheeler, and which said tenancy before and at the time of the committing of the said several trespasses in the declaration mentioned was and still remained in full force and effect: That the said Daniel Glenister was at the time of the committing of the said several trespasses in the declaration mentioned the assignee of the said Robert Wheeler and Thomas Wheeler of the said piece of land in the said indenture mentioned; wherefore he the said Daniel Glenister in his own right, and the said defendant Thomas Glenister and John Corby as servants of the said Daniel Glenister, and by his command, at the said several times when, &c., did pass and repass in, through, and along the said way, from the said piece of land now in the possession of the said Daniel Glenister, upon and over the said bridge, and in, through, and along the said lands in the declaration mentioned, to the said piece of land now in the possession of the defendant Daniel Glenister, using the said way there, for the purposes and on the occasions aforesaid, as they lawfully might for the causes aforesaid.

The plaintiffs in their replication took and joined issue upon all the pleas; and, as to the fourth plea, new-assigned that they sued not only for the causes of action therein admitted, but also for trespasses committed by the defendants in excess of the alleged right, and also in other parts of the said premises, and on other occasions, and for other purposes than those referred to in the plea.

As to the several trespasses above newly assigned, the defendants brought into court the sum of 40s., averring that the said sum was enough to satisfy the claim of the plaintiffs in respect to the matter therein pleaded to.

To this plea, the plaintiffs replied that the sum paid *into court was not enough to satisfy the causes of action in respect [*84 of which it had been paid in. Issue.

The cause was tried before Wightman, J., at the Berkshire Summer Assizes, 1862, when the following facts appeared in evidence:—The plaintiffs, being possessed of certain building land situate on the south side of the turnpike-road leading from Chipping Wycombe to High Wycombe, but at some distance from the road, and being desirous of opening a communication between their property and the road, agreed with one Meyers (the owner) for the purchase of a strip of the intervening land thirty feet wide, for the purpose of forming thereon a road, the plaintiffs stipulating to make the road and build a bridge across the stream, and Meyers to build the fence-walls and keep them in repair. In the conveyance, which was dated the 5th of June, 1860, the land so purchased was described as “a place or parcel or ground situate, lying, and being in the parish of Chipping Wycombe, in the county of Buckingham, measuring from east to west thirty feet.” The words “or thereabouts” had been added, but were erased at the desire of the purchasers before the execution of the deed.

The thirty feet had been staked out at the time of the conveyance by Skull, who was then acting as the general agent of Meyers. The road was afterwards made and a bridge built by the plaintiffs, and a wall erected on each side by Skull as such agent for Meyers.

On the 4th of September, 1861, the plaintiffs conveyed to Messrs. Wheeler in fee a close adjoining the new road. In this conveyance the subject of the grant was described as “All that plot or parcel of land situate in the borough of Chipping Wycombe aforesaid having a frontage of forty-one feet to the new road there leading from the turnpike-road to a certain lane *called St. John’s or Water Lane, [*85 and measuring in depth seventy-five feet or thereabouts, bounded on or towards the north by premises belonging to Barnett Meyers, on the west by property belonging to —, on the east by the said new road there, and on or towards the south by land still belonging to the said T. Phillipps and E. Skull, and which said plot or parcel of land intended to be hereby conveyed *lately* formed part of the meadow ground mentioned and described in and conveyed by the said indenture of the 29th day of September, 1860, (a) and comprised in Lot 13 at an auction sale held on the 2d day of November now last past, together with a right of way and passage, ingress, egress, and regress, with horses, carts, and carriages, or otherwise, in, through, and over the said new road or way to and from the turnpike-road leading from High Wycombe to Oxford, to and from the said lane or highway called St. John’s Lane or Water Lane.”

Shortly afterwards, viz. on the 13th of January, 1862, the defendant Daniel Glenister obtained a conveyance from Meyers of a piece of building land adjoining Wheelers’ close, but having no communica-

(a) Under which the land was conveyed to Phillipps and Skull.

tion with the new road. Being desirous of building on this land, Glenister hired Wheelers' close for the alleged purpose of making it a place of deposit for the building-materials to be used upon his own land. There was no evidence as to the nature of the tenancy between the Wheelers and Glenister, further than that the latter was to pay 1*l.* a year for the use of the close; and the jury found that nothing was said about the right of way which the Wheelers had along the new road to their close. Having thus acquired possession of Wheelers' close, the defendant Daniel Glenister proceeded to cart materials *86] thereon by going along the *new road and across the bridge: and, according to the plaintiffs' evidence, some of the materials were carried directly through Wheelers' close to the defendants' land. For this alleged trespass, and also for breaking down a portion of the wall, this action was brought.

There was a considerable conflict of evidence as to the measurement of the road; but upon the whole it appeared that there were not thirty feet clear between the walls.

On the part of the plaintiffs it was contended that the letting by Wheelers to the defendant Glenister did not pass the right of way; and that, assuming that the right of way to Wheelers' close passed, the defendants had no right to use the way for the purpose of going beyond Wheelers' close and delivering materials on to their own land.

The defendants, on the other hand, insisted that the way being appurtenant to the grant to Wheelers, the right passed to them as tenants of Wheelers' close, and that there had been no excess.

The learned judge left it to the jury to say whether or not there had been a letting of Wheelers' close to Glenister, and whether expressly with the right of way; telling them that unless it was in terms let with the right of way, they must find for the plaintiffs; and also that the plaintiffs were entitled to recover in respect of the trespass to the wall, if there was not thirty feet of roadway between the two fences.

The jury found that there had been a letting, but that no mention was made at the time of the right of way: and they assessed the damages at 50*s.* being 49*s.* for the damage to the road, and 1*s.* for the rest of the trespasses.

H. Mills, Q. C., in the following Michaelmas Term, obtained a rule *87] nisi for a new trial, on the ground that *the learned judge misdirected the jury,—first, in telling them that the letting by Wheelers did not convey the right of way,—secondly, in directing them that the plaintiffs were entitled to recover if there was not thirty feet of roadway between the walls fencing the road conveyed to the plaintiffs by Meyers: and also on the ground that general damages had been taken for matters under the new-assignment with other matters complained of, the 40*s.* paid into court being enough to cover those under the new-assignment. He referred to *Manning v. Fitzgerald*, 29 Law J. Exch. 24, where the court say that “parcel or no parcel is always a question for the jury.”

O'Malley, Q. C., and *David Keane*, in Hilary Term, 1863, showed cause.—The direction of the learned judge was right, as was also the conclusion at which the jury arrived. The short facts are these:—

One Meyers was originally the owner of a large plot of land lying to the south of a certain stream. In the year 1860, Meyers sold a portion of this land to the plaintiffs. It became necessary for the plaintiffs to secure a roadway to their land; and accordingly they agreed with Meyers for the purchase of a strip of the land between it and the turnpike-road, they stipulating to make the road and build a bridge across the stream, and Meyers covenanting to erect and maintain the fence walls. The strip of land thus purchased was described in the conveyance as "a piece or parcel of land or ground situate, lying, and being in the parish of Chipping Wycombe, in the county of Buckingham, measuring from east to west thirty feet." The road, bridge, and fences were accordingly made and erected. In 1861, the plaintiffs sold to the Messrs. Wheeler a piece of land adjoining this new road, "together with a right of way and passage, ingress, egress, and *regress, with horses, carts, &c., in, through, [*88 and over the said new road or way to and from the turnpike-road leading from High Wycombe to Oxford, to and from the said lane or highway called St John's Lane or Water Lane." In January, 1862, the defendant Daniel Glenister purchased of Meyers a piece of building land adjoining to Messrs. Wheelers' land. The land so purchased by Glenister having no communication with the plaintiffs' new road, Glenister hired Wheelers' close, and without any conveyance of a right of way used the plaintiffs' road as a means of getting at his own land through Wheelers'. The right thus claimed was quite distinct from the enjoyment of the land in respect of which it was granted. It was in no way appurtenant; or, if appurtenant, it was only so for the use of the land to which the right was annexed. Neither the grantees nor assignees could use it for any other purpose. A grant of a right of way to close A. does not warrant the grantee in using it for the purpose of getting to close B. The case of *Allen v. Gomme*, 11 Ad. & E. 759 (E. C. L. R. vol. 39), 3 P. & D. 581, shows the strictness with which grants of way are construed. Lord Denman, in delivering the judgment of the court, there says (p. 770),—"It has been held, that, if a man has a right of way to a close called A., he cannot justify using the way to go to A., and from thence to another close of his own adjoining to A. Vide 1 Rol. Abr. *Chimin Private* (A), pl. 3; *Howell v. King*, 1 Mod. 190; *Lawton v. Ward*, 1 Ld. Raym. 75, 1 Lutw. 111." If that be so, a grant of a way, as here, from road to road, could not justify the grantee in going from the close to which the way was granted to the adjoining close or any part of it. At all events, it would not pass to Wheelers' tenant. [ERLE, C. J.—If a way appurtenant, it would.] With respect to the wall, the question was, what was conveyed to the plaintiffs by the *deed [*89 of the 6th of June, 1860. The description in the deed is, "a piece or parcel of land or ground situate, lying, and being in the parish of Chipping Wycombe, in the county of Buckingham, measuring from east to west thirty feet." There is no ambiguity, no falsa demonstratio. The direction of the learned judge upon this point was quite in conformity with the rule laid down in all the cases. In *Roe v. Lidwell*, 11 Irish Common Law Rep. 320, it was held that a full and complete description of the subject-matter of a deed being followed by another description in same instrument, the first descrip-

tion will be preferred, although the second is equally full and complete: therefore, where a deed of conveyance purported to convey "the town and lands of Dromardmore, situate in the barony of Ikerrin and county of Tipperary, containing 1085a. Or. 23p., statute measure, or thereabouts, *and described in the annexed map*, with the appurtenances; and it was proved that the map annexed to the deed comprised a portion of the lands called Dromardbeg, and not Dromardmore,—it was held that the first description in the deed of the lands of Dromardmore, being sufficiently complete and certain, should prevail over the second description, comprised in the words "described in the annexed map;" and that nothing passed by the deed which was not part of Dromardmore. Lefroy, C. J., in delivering the judgment of the court of error, there says,—p. 326,—"I take the rule to be this, as laid down in Sheppard's Touchstone, pp. 99, 246, 247 — 'Whenever there is, in the first place, a sufficient certainty and demonstration, and afterwards an accumulative description, and it fails in point of accuracy, it will be rejected. *Falsa demonstratio non nocet.*' This rule is stated and exemplified in a variety of cases collected from Brooke, Plowden, Dyer, and other ancient authorities; from which it *90] also appears that 'the grant of land by its name, constitutes *primâ facie* that 'sufficient certainty and demonstration' which will satisfy the rule. Thus, it is said, 'If one grant all his lands in Dale which he had of the gift of J. S., by this grant (thus restricted) nothing will pass but that which he had of the gift of J. S. But, if one grant all his lands in Dale, called Hodges (being a full description and certainty in itself), which he had of the gift of J. S., by this grant all that which is *called* Hodges shall pass, albeit the grantor had it not of the gift of J. S. (for, *falsa demonstratio non nocet.*)' So, again, in another case, it is said, 'If a parish lie in two counties, viz. Berks and Wilts, and one grant in this manner, "all his close *called* Callis, in the parish of Hurst, in the county of Berks," and in truth the close doth not lie in the county of Wilts, this is a good grant to pass *the close* (because the close passes by *the name* as a full and certain description.' In the present case, we have the certainty of the name of the close, intended to be passed, and, in addition to the principle of law, there is evidence which abundantly negatives its being the close delineated on the map, which must therefore be rejected as a *falsa demonstratio*. So, again it is said in another case, 'If one grant in this manner, "my manor of Dale, which appeareth by office found to be of the value of 10*l.* per annum," and in truth in the office it is found at 20*l.* per annum, this grant is good, notwithstanding this misprision (because there is a certainty, with a false demonstration).' But it has been argued, that, as the map was held to be the guide in *Errington v. Rorke*, 9 Irish Common Law Rep. 367, so it should be in the present case: but, in that case, the deed made the map the guide. The grant was 'part of the Bog of Allan and Clunagh;' but what part was not further specified than by reference to the annexed map, which alone afforded any certainty or ascertainment as to what *91] 'part was intended to pass. It was not a grant of 'the Bog of Allan and Clunagh,' but only a part, and what part was only ascertained or ascertainable by reference to the map. The map was therefore the only means of certainty as to what was intended to pass.

In the present case, by the grant of Dromardmore, by its name, *constat de corpore*. There is also the positive evidence to show that the map is '*falsa demonstratio*,' as to the description *by occupation*, in the summons and plaint, of the land claimed by the plaintiff. We have also the authority of this court in the case of *The Dublin and Kingstown Railway Company v. Bradford*, 7 Irish Common Law Rep. 57, 624, which appears to be quite decisive to show, that, where the map conflicts with the grant, which contains a certainty beyond doubt, the map may be rejected as *falsa demonstratio*." So, in *Lord Waterpark v. Fennell*, 7 House of Lords Cases 650, 684, Lord Wensleydale says,—“Whether parcel or not is often said, but not with strict propriety, to be a question for the jury. I apprehend that the true rule is perfectly well settled, and is fully explained in Sir James Wigram's excellent Treatise on the subject. The construction of a deed is always for the court, but, in order to apply its provisions evidence is in every case admissible of all material facts existing at the time of the execution of the deed, so as to place the court in the situation of the grantor.”

H. Mills, Q. C., and *A. K. Stephenson*, *contra*, were not called upon.

ERLE, C. J.—Upon the first question, I am of opinion that there was a little inaccuracy in the direction, and consequently that there must be a new trial. If there be a right of way appurtenant to land, and the land is demised, the right will pass to the lessee. When, therefore, the defendant Daniel Glenister became *tenant of [*92 *Wheeler's* close, the right of way which the Messrs. Wheeler had as appurtenant to that close passed with it, though nothing was said at the time about it.

WILLIAMS, J.—I am of the same opinion.

WILLES, J.—I am of the same opinion. It is clear that at least a right to use the road for the purpose of access to and from *Wheeler's* close was granted by the deed by which *Phillipps* and *Skull* granted that piece of land to the Messrs. *Wheeler*. The case of *Ackroyd v. Smith*, 10 C. B. 164 (E. C. L. R. vol. 70), which has been somewhat misunderstood, shows that that was a grant of a way as appurtenant to the land, and consequently it passed by the demise of the land to *Glenister*. *Allan v. Gomme* is not the last of the series of cases on the subject. That case was cited and explained in *The South Metropolitan Cemetery Company v. Eden*, 16 C. B. 42 (E. C. L. R. vol. 81). A correct exposition of the law is also to be found in *Gale on Easements*, 3d edit. 451, 452.

KEATING, J.—I concur with the rest of the court, for the reasons given by my Lord.

Rule absolute.

Before the cause went down again, the pleadings were amended by limiting the first, second, and third pleas to the several trespasses in the declaration mentioned *except as to the casting, depositing, and throwing the said bricks, mortar, earth, and rubbish as in the second count mentioned*, and by adding a fifth plea as to the several trespasses excepted in the first, second, and third pleas, bringing into court the sum of 10*s.*, and averring that that sum was enough to satisfy the claim of the plaintiffs in respect of the said trespasses so excepted as aforesaid; and also by adding a plea *of payment into court of [*93 40*s.* in respect of the trespasses newly assigned.

The plaintiffs replied to the fifth plea by accepting the sum so paid into court in full satisfaction and discharge of the causes of action in respect of which it had been paid in.

The second trial took place before the same learned judge at the Aylesbury Summer Assizes, 1863. The evidence given upon this occasion was substantially the same as on the former trial, except that the defendants offered in evidence the conveyance from Meyers to Daniel Glenister of the 13th of January, 1862, for the purpose of showing that the wall adjoining the land sold by Meyers to Daniel Glenister passed to him by that deed. This was objected to as irrelevant, and rejected.

The following are the questions which were put by the learned judge to the jury, and their answers thereto:—

"1. Did the defendants break down any part of any wall standing upon land of the plaintiffs? If they did, what damage did the plaintiffs sustain thereby? Answer. Yes: damage, 20*l*.

"2. Was the land conveyed by Meyers to the plaintiffs by the deed of the 6th of June, 1860, that which was contained between stakes that had been put down, whether of the width of thirty feet or not, or land of the width of thirty feet bounded as in the deed is mentioned? Answer, that it was land of the width of thirty feet, and not land between the stakes.

"3. Did the defendants break up any land of the plaintiffs? If they did, what damage did the plaintiffs sustain? Answer. Yes: damages, 1*s*.

"4. What amount for all damages sustained by the plaintiffs by the use of the road by the defendants in passing with carts and carriages with materials which did not go to Wheelers' land? Answer, 39*s*.

*94] "5. Did the defendants really use the way with carts and wagons as a way to Wheelers' land, or did they really use it as a way to the houses they were building? And was the going first to Wheelers' a mere colourable use? Answer. It was a mere colourable use.

"6. What amount for all damages sustained by the plaintiffs for the use of the way by the defendants to Wheelers' land, and from thence to the houses the defendants were building? Answer, 3*l*."

A verdict was thereupon entered for the plaintiffs, damages 25*l*.

Lush, Q. C., in Michaelmas Term last, obtained a rule nisi for a new trial on the ground of misdirection on the part of the learned judge "in leaving to the jury the question whether the land conveyed by Meyers to the plaintiffs by the deed of the 6th of June, 1860, was that which was contained between the stakes put down, whether of the width of thirty feet or not, or land of the width of thirty feet bounded as in the deed mentioned; and also in leaving to the jury the question whether the defendants used the way as a way to the houses they were building, or whether it was a colourable use, and to find damages for the plaintiffs caused by the use of the way in question by the defendants to Wheelers' land, and from thence to the houses the defendants were building;" and also "for improperly rejecting as evidence the deed of the 13th of January, 1863, by which Meyers conveyed the wall in question to the defendants;" and also on the ground

that the verdict was against the weight of evidence on the first question.

O'Malley, Q. C., *Mellish*, Q. C., and *Keane*, showed cause.—The direction of the learned judge was perfectly correct. Whether or not the wall in question *was built upon the land of the plaintiffs, depends upon the construction of the conveyance of the 6th of [*95 June, 1860. Where there is any equivocation or latent ambiguity in the description of the property intended to pass by a deed, parol evidence may be admitted to explain and apply it. Here, it is plain that a way of the width of thirty feet was what was intended to be conveyed: it was proved that the words "or thereabouts" had been erased from the deed before its execution. No reference is made to any portion of land staked out. There is nothing to raise a doubt: thirty feet, therefore, passed by the deed. In *Doe d. Norton v. Webster*, 12 Ad. & E. 442 (E. C. L. R. vol. 40), 4 P. & D. 270, where a deed purported to convey "a messuage or tenement formerly used as a workhouse, in the occupation of W., with the appurtenances," and it was shown that there was a small garden adjoining, which had been always occupied by W. as master of the workhouse,—it was held that the garden passed, and that the grantor could not afterwards be admitted to narrow the operation of his grant by showing that the conditions of sale, signed by the vendee at the time of the sale, expressly excepted the garden, or by proving subsequent declarations by the grantee that it had not been purchased by him. [WILLIAMS, J.—Were the facts from which the construction relied on by the defendants was sought to be drawn controverted?] They were.

As to the right of way,—it appeared that the plaintiffs had sold to Messrs. Wheeler a plot of land abutting upon the road in question, together with a right of way thereto along the road. The defendants afterwards purchased from Meyers another piece of land also abutting upon the road, and, having obtained a demise of Wheelers' plot, used the road as a means of access to their own land through Wheelers'. This they clearly had no right to do. The authorities on *this [*96 subject are uniform. In *Lawton v. Ward*, 1 Ld. Raym. 75, [*96 Lutw. 114, the defendant prescribed for a way to his close C. The plaintiff confessed the prescription of the defendant, but said that he drove his carts to C., and also further to D.: and it was resolved by the court "that the defendant has not pursued his prescription; for, the prescription is to go to C.; then, when he goes to C., and further to D., he has not authority to do it." And Powell, J., said that "the difference is, where he goes further to a mill or bridge, there it may be good; but, when he goes to his own close, it is not good; for, by the same reason, if the defendant purchases a thousand closes, he may go to them all, which would be very prejudicial to the plaintiff." And for authorities they relied upon 1 Roll. Abr. 391, pl. 3, 1 Mod. 190. The case referred to in 1 Mod. is *Howell v. King*,—"Trespass for driving cattle on plaintiffs' ground. The case was, A. has a way over B.'s ground to Black Acre, and drives his beasts over B.'s ground to Black Acre, and thence to another place lying beyond Black Acre: and whether this was lawful or no was the question upon a demurrer. It was urged, that, when his beasts were at Black Acre, he might drive them whither he would. On the other side it was said that by

this means the defendant might purchase a hundred or a thousand acres adjoining to Black Acre, to which he prescribes to have a way, by which means the plaintiff would lose the benefit of his land; and that a prescription pre-supposed a grant, and ought to be continued [construed?] according to the intent of its original creation. The whole court agreed to this; and judgment was given for the plaintiff." In *Allen v. Gomme*, 11 Ad. & E. 759 (E. C. L. R. vol. 39), 3 P. & D. 581, a reservation of a right of way to a piece of ground, was held not to warrant the grantor in using the way to a cottage subsequently built. In *Dand v. Kingscote*, 6 M. & W. 174, by a deed *dated *97] in 1630, the grantor conveyed in fee-farm land in the manor of Amble, in the county of Northumberland, "excepting and reserved out of the grant all mines of coals within the fields and territories of Amble aforesaid, together with sufficient way-leave and stay-leave to and from the said mines, with liberty of sinking and digging pit and pits:" by another deed of the same date, the same parties conveyed in fee-farm to other persons lands in the manor of Hauxley (adjoining Amble), with a like exception, reservation, and covenant; and it was held, that, under the reservation of the former deed, the coal-owner could not carry over Amble coals got in Hauxley, although from a part of the same mineral field. "A license to use a way to or from Black Acre, would not have included a permission to go to or come from beyond it:" per Parke, B., in delivering the judgment of the court in *Colchester v. Roberts*, 4 M. & W. 769, 774. [ERLE, C. J.—I do not imagine that Mr. Lush will dispute that. His complaint is, that the learned judge left to the jury the animus of the defendants in using the road.] The question left was, whether the defendants were bonâ fide using Wheelers' close as a place of deposit for building materials, or were simply carting them through Wheelers' close to their own land, and thus using the way in a manner in which they were not justified in using it. There is nothing wrong in so leaving the question. With respect to the rejection of the deed of the 13th of January, 1863, it is difficult to see how a conveyance to which the plaintiffs were no parties could be material. And, as to the verdict being against evidence, there was evidence on both sides, and the learned judge does not report that he was dissatisfied with the verdict.

*98] *Lush, Q. C. and A. K. Stephenson*, in support of the *rule.—Upon the first point there was a clear misdirection, in leaving to the jury a question which virtually was, what was the construction of the deed. The learned judge in effect left it to the jury to put a construction upon the deed, which he found a difficulty in construing for himself. The proper question to be put was, did the stakes mark out the piece of land intended to be conveyed. The evidence was that the piece was staked out before the execution of the conveyance, in order to make the plan. If there was a slight inaccuracy in the measurement, that would be mere falsa demonstratio. Suppose that, instead of the stakes being placed, the walls had been built at the time the deed was executed, could it be contended that the grantee would have a right to pull down the wall if it turned out that the true measurement fell a few inches short of thirty feet? [WILLIAMS, J.—There would be a difference between a permanent structure and a mere temporary defining of the line.] Not for the purpose of construction, it is sub-

mitted. Leave out the stakes, and where is the roadway? The description would be satisfied by thirty feet of any part of the land belonging to the grantor. Where the deed contains a name or any other designation whereby the subject of the conveyance can be identified and ascertained, any other description by measurement or plan or otherwise may be rejected as *falsa demonstratio*.^(a) Recourse is only to be had to extraneous evidence for the purpose of supplying what is defective in the deed. [ERLE, C. J.—The proper question to leave to the jury was, whether the stakes were placed for the purpose of defining what was intended to pass.^(b)]

The next question is as to the user of the way. It *appeared [*99 that the defendant Daniel Glenister rented the close conveyed to Messrs. Wheeler, with the right of way appurtenant thereto. The contention on the part of the plaintiffs was, that the defendants used the way in excess of the grant, viz. for the purpose of getting to land of Daniel Glenister adjoining Wheelers' close. It may be conceded, that, if a right of way be granted to close A., the grantee cannot extend the grant by using the way for the purpose of going to close B. *Allan v. Gomme*, 11 Ad. & E. 759 (E. C. L. R. vol. 39), 3 P. & D. 581, and other cases fully establish that. But none of those cases at all conflict with the present argument. It is not to be lost sight of, that this land was sold for building land. What was there to prevent the defendants from exercising the right of way to Wheelers' close for the purpose of making that a place of deposit for materials to be used by them upon the adjoining land? [WILLES, J.—Could the defendants have carried coals along the way and stacked them upon Wheelers' close, for the purpose of consuming them in a furnace built on the adjoining close?] Clearly they could; or for the purpose of selling them. The right appurtenant to Wheelers' close was not a mere limited right, as in *Allan v. Gomme*, but a right to use the way for all purposes. In *Henning v. Burnet*, 8 Exch. 187, Parke, B., in the course of the argument, says,—“In *Allan v. Gomme*, a more strict rule was laid down than I should have been disposed to adopt; for, it was said that the defendant was confined to the use of the way to a place which should be in the same predicament as it was at the time of the making of the deed. No doubt, if a right of way be granted for the purpose of being used as a way to a cottage, and the cottage is changed into a tan-yard, the right of way ceases: but, if there is a general grant of all ways to a cottage, the right is not lost by reason of the cottage being altered.” * [WILLIAMS, J.—If the inten- [*100 tion of the defendants was really to use the road as a way to their own close, they could not evade the rule of the law by merely dropping the materials upon Wheelers' close and then picking them up again and carrying them on. The proper question, therefore, I conceive was, whether the use made of the road was *bonâ fide* or colourable.]

As to the deed of the 13th of June, 1862, it was offered in evidence for the purpose of showing that the defendants in pulling down the wall were acting in the *bonâ fide* assertion of a supposed right,—

(a) See *Barton v. Dawes*, 10 C. B. 261 (E. C. L. R. vol. 70).

(b) It was asserted by O'Mally, and denied by Stephenson, that that question was put. See *vide antè*, p. 93.

Meyers having by that deed conveyed to them the land they occupied *together with the wall erected thereon*,—and in answer to the plaintiffs' claim for vindictive damages.

ERLE, C. J.—This was an action brought by the plaintiffs to recover damages for an alleged trespass committed by them upon a piece of land granted to the plaintiffs by one Meyers by a deed bearing date the 6th of June, 1860, and the first question raised before the jury, and which has been the subject of much contention before us, is, what is the boundary of that piece. That question must be determined by the description of the land contained in the deed, according to the true construction of the words used. The land granted is there described as, "All that piece or parcel of land or ground situate, lying, and being in the parish of Chipping Wycombe, in the county of Buckingham, measuring in width from east to west thirty feet, forming part of the two pieces or parcels of meadow or pasture land purchased by the said B. Meyers of Job Pierce, and described in and conveyed by the hereinbefore in part recited indenture,^(a) which said

*101] piece *or parcel of land or ground hereby appointed and conveyed is intended to be used as a roadway from the turnpike-road there to the property lying on the south side thereof, and is bounded on the north by the turnpike-road leading from High Wycombe to Oxford, on the west and east by other land belonging to the said B. Meyers, and on the south by property of the late George Giles and contracted to be purchased by the said E. Skull and T. Phillipps, and is more particularly delineated and described in the map or plan thereof drawn in the margin of these presents; that part thereof now used as garden-ground being therein coloured yellow, and that part thereof now covered with water being therein coloured blue; the fences of which said piece or parcel of land or ground hereby conveyed on the east and west sides are to be made and maintained by the said B. Meyers, his heirs, appointees, or assigns." The question is, what is the boundary of that piece of land. The evidence at the trial was, that, before the deed was executed and the plan put in the margin, the plaintiff Skull, who was then acting as agent for Meyers, went upon the land for the purpose of marking out the thirty feet for the roadway, and placed stakes along the line. That was good evidence for the jury to indicate what was intended to pass by the deed. On the part of the plaintiffs it was insisted that the words "containing thirty feet," must be taken to be the governing description, and that, assuming the wall on the west side to be correctly placed, they were entitled to thirty feet clear, which they had not; and therefore it was contended that the defendants had by assuming dominion over the opposite wall encroached upon the plaintiffs' land. The learned judge left it to the jury to say whether the boundary was to be ascertained by taking a space of thirty feet from the west wall or by the stakes.

*102] *The jury thought the former. I am of opinion that the correct question was not left. The construction of a deed or other written instrument is for the court. It is almost always necessary that the court should be informed of the surrounding circumstances under which a deed is executed. If there be any dispute, these must

(a) An indenture of the 26th of March, 1855, whereby Pierce conveyed to Meyers the two pieces of meadow land therein described.

be ascertained by the jury: and, when that has been done, the court is to apply the description in the deed. Here, there was a material question to be ascertained by the jury, viz. whether or not the stakes were put down for the purpose of marking out and defining the boundaries of the piece of land to be conveyed to the plaintiffs. When that question should have been ascertained, it would be the duty of the judge to construe the deed. It might be matter of controversy whether the measurement was to be from the outside or the inside or from the centre of the stakes: but all that would be for the jury. That question, however, was not left, and therefore upon this ground the parties must go down again.

As to the right of way, I think the direction of the learned judge was right. The way granted to the Messrs. Wheeler by the deed of the 4th of September, 1861, is thus described, "together with a right of way and passage, ingress, egress, and regress, with horses, carts, and carriages, or otherwise, through and over the said new road or way to and from the turnpike-road leading from High Wycombe to Oxford, to and from the said lane or highway called St. John's Lane or Water Lane." It was a way appurtenant to Wheelers' close. It was contended on the part of the plaintiffs that it could only lawfully be used as a way connected with the enjoyment of Wheelers' close. The evidence was, that the defendants, who had hired Wheelers' close, used it as a place of deposit for building materials to be used upon their own land adjoining. It was *contended on the part of [103] the plaintiffs, that, if Wheelers' close was used merely as a means of getting to Glenister's close, that was not a user of the way within the terms of the grant. The question which the learned judge left, was, whether the defendants used the way as a way to Wheelers' land, or was it a mere colourable use of it for the purpose of getting at their own land. That seems to me to be in substance what the summing-up amounts to. Did the defendants use the way merely for the purpose of carrying the building-materials through Wheelers' close to their own land? I think that was the correct way to leave the question: and the learned judge has not reported to us that he is dissatisfied with the finding.

At present it is unnecessary to consider the question as to the admissibility of the deed of the 13th of June, 1862. As far as I am aware, if the plaintiffs asked for exemplary or substantial damages, on the ground that the defendants wilfully annoyed the plaintiffs in the enjoyment of their rights, it was competent to the defendants to show that they were exercising what they conceived to be their own rights in doing what they did. For this purpose, as at present advised, it seems to me that the deed which the learned judge rejected was admissible. But it is not necessary to rest our judgment on that. The grand point is, that the question was not so left to the jury as it ought to have been as to the part of the land which was granted to the plaintiffs. The justice of the case, however, would probably be attained, and much useless litigation spared, if the parties would consent that the verdict should stand for the plaintiffs on the first count, and also on the second count except as to that part which relates to the wall, and as to that should be entered for the defendants.

*104] WILLIAMS, J.—I entirely agree in the opinion which *has been expressed by my Lord, that the learned judge who tried the cause was wrong in the way in which he left the question to the jury upon the first point. The construction of a deed is for the court, though it is the proper function of the jury to assist the judge as to any controversy of fact which may arise. When the facts are ascertained, it is the duty of the judge to say what is the proper construction and effect of the deed. In the present case it appears there was no mode of defining the land granted by the deed of the 6th of June, 1860, except as enclosed within the stakes. The thirty yards intended to be conveyed was part of a larger piece. Until ascertained, the boundary was a mere imaginary line. It is unnecessary to go so far as to say that it appears that the stakes were put there with a view to guide the conveyancer: it is enough to say that they were put down for the purpose of the grant. They were there, it seems, at the time the conveyance was executed. That being so, the deed purports to convey to the grantees "all that piece or parcel of land or ground situate, lying, and being in the parish of Chipping Wycombe, in the county of Buckingham, measuring in width from east to west thirty feet. The plaintiffs' contention is, that that description is to be the governing description, and that the land is to be at all events of the width of thirty feet. But the difficulty I feel in going along with the plaintiffs, is, that, if it should turn out that the width is less than thirty feet, it is impossible to say on which side it is to be augmented. That suggestion, therefore, being rejected, the description must refer to the land already marked out for the purposes of the grant; and, although it is described inaccurately, that must be taken to be a mere falsa demonstratio, and the deed must be held to pass the piece staked

*105] out. For these reasons it seems to me *that the facts which were uncontroverted in the case should have led the learned judge to tell the jury that nothing passed by the deed but what was comprised within the stakes.

As to the second point made in the case, I am of opinion that the direction was substantially correct. I see no reason to doubt the authority of the cases cited in Gale on Easements, 3d edit. pp. 451, 452. It is there said, that, "as every easement is a restriction upon the rights of property of the owner of the servient tenement, no alteration can be made in the mode of enjoyment by the owner of the dominant heritage, the effect of which will be to increase such restriction. Supposing no express grant to exist, the right must be limited by the amount of enjoyment proved to have been had. Thus, it is laid down in Rolle's Abridgment, *Chimin Private* (A.), pl. 1, if A. be seised in fee, and grant to B. a right of way to a certain close, B. cannot use that way to go to other closes without first going to the other close specified in the grant. But it was said, that, if a defendant justifies under a right of way from D. to Blackacre, if the plaintiff replied that at the time of the trespass the defendant went with his carriages from D. to Blackacre, and thence to a mill, the replication would not support the action, for, when he was in Blackacre, he might go where he pleased. But it seems, that, if a man have a way for carriages from D. to Blackacre over my close, and afterwards he purchase land adjoining to Blackacre, he cannot use the aforesaid way

with carriages to the land adjoining, though he go first to Blackacre, and from thence to the land adjoining, for, this might be greatly prejudicial to my close; but it seems, that, if I wish to help myself, I ought to show this special matter, and that he uses it for the land adjoining. In the later case of *Ward v. Lawton*, 1 *Ld. *Raym.* [*106 75,(a)] the defendant justified under a right of way for carts and carriages to a close called C. The plaintiff replied, that the defendant drove the carts to C., and also further to D. The plaintiff upon demurrer to the rejoinder had judgment; and it was resolved 'that the defendant had not pursued his prescription, for, the prescription is to go to C.; that, when he goes to C., and further to D., he has not authority to do it.' And Powell, J., jun., said 'that the difference is, where he goes further, to a mill or a bridge, there it may be good; for, by the same reason, if the defendant purchases one thousand closes, he may go to them all, which would be very prejudicial to the plaintiff.' And for authorities they relied upon 1 *Rol. Abr.* 391, pl. 3, 1 *Mod.* 190, 3 *Keble* 348." These authorities appear to establish the principle, that, if the defendants here had directly used the road in question as a way over the grantor's land through Wheelers' close to Glenister's, that would have been an excess of the right. The question was whether they had not substantially done so. The jury must be taken to have found that they had. Upon this part of the case, therefore, I think the direction was substantially right, and the verdict justified by the evidence.

WILLES, J.—I am of the same opinion, and for the reasons given by my Lord and my Brother Williams. The result will be that the verdict found for the plaintiffs on the first count, and also on the second count except as to that part which relates to the wall, will stand, and that, as to so much of the second count as relates to the wall, the verdict will be entered for the defendants,—each party bearing their own costs of and occasioned by this application.

KEATING, J., concurring,

Rule accordingly.

* (a) And see *Harrison v. Peck*, *Latch* 110.

*CAWLEY v. KNOWLES. Feb 1. [*107

A cause stood for trial at the sittings after Trinity Term. The defendant obtained a judge's order for a commission to examine witnesses abroad, the commission to be returnable on the 30th of November, and the trial being postponed until the sittings after Michaelmas Term. No fresh notice of trial was given, and the cause was taken as an undefended cause:—The court set aside the trial.

Where the defendant obtains a rule for a special jury (in a town cause), but omits to give notice to the sheriff under the 112th section of the Common Law Procedure Act, 1852, that the cause is to be tried by a special jury, in the absence of a special jury, the cause may, under s. 112, be tried by a common jury.

T. JONES moved for a rule calling upon the plaintiff to show cause why the trial of this cause, which took place before Keating, J., at the sittings in London after the last Term, on which occasion a verdict was found for the plaintiff with 50% damages, should not be set aside for irregularity. The facts were as follows:—The cause being set down for trial at the sittings after Trinity Term last, the defend-

ant obtained an order from Byles, J., for leave to issue a commission to examine witnesses abroad, the commission to be returnable on the 30th of November, and postponing the trial until the sittings after Michaelmas Term. No commission having been issued, the plaintiff, without giving a fresh notice of trial, procured the cause to be set down again (it not being properly a remanet), and the defendant's attorney received notice from the associate that it was appointed for a certain day. The defendant not appearing on the day mentioned, the cause was tried as undefended. In Archbold's Practice, 11th edit. 312, it is said that a fresh notice of trial is necessary where the trial is put off by rule of court or order of a judge,—referring to *Jacks v. Mayer*, 8 T. R. 245, where the court said "that the distinction was this: If a cause be made a remanet, it may be tried at the next sittings without any other notice; but, if the trial be put off by rule of court, there must be a fresh notice of trial." And they said, that, "even when a plaintiff gives a peremptory undertaking to try at the next sittings or assizes, there also a new notice of trial must be given, because, notwithstanding such undertaking, the plaintiff may decline trying his cause.

*108] *ERLE, C. J.—You may take a rule reserving the question of costs.

T. Jones.—There is a further objection to the proceeding. The cause, though marked as a special jury cause, was tried by a common jury. This was not warranted by the Common Law Procedure Act, 1852; neither is it in accordance with the practice before that act. In *Haldane v. Beauclerk*, 3 Exch. 658, the defendant obtained a rule for a special jury, which was nominated and struck, but no special jury process issued, and the cause was tried by a common jury as undefended: and the court set aside the trial with costs.(a) Here, the defendant had obtained a rule for a special jury, and the cause was marked as a special jury cause: either party might have summoned a special jury. [WILLES, J.—Was notice given to the sheriff?] No notice is ever given in town causes.(b) [WILLES, J.—The provisions as to special juries in town causes are contained in sections 110, 111, 112 and 113 of the Common Law Procedure Act, 1852. Section 110 enacts, that, "in London and Middlesex, special jurors shall be nominated and reduced by and before the under sheriff and secondary respectively, in like manner as by the Master before this act, upon the application of either party entitled to a special jury, and his obtaining a rule for such purpose; and the names of the jurors so struck shall be placed upon a panel, which shall be delivered and annexed to the nisi prius record, in like manner and upon the same terms as hereinbefore provided with reference to the panel of common jurors; and upon the trial the special jury shall be balloted for and called in the order in which they shall *109] be drawn from the box, in the same *manner as common jurors." Section 111 enacts, that, where the defendant in any case, or plaintiff in replevin, gives notice of his intention to try the cause by a special jury, and the venue is in London or Middlesex, the court or a judge, if satisfied that such notice is given for the

(a) And see *Montague v. Smith*, 17 Q. B. 688 (E. C. L. R. vol. 79).

(b) See *Devanoge v. Borthwick*, 2 L. & P. M. 277.

purpose of delay, may order that the cause be tried by a common jury, or make such other order as to the trial of the cause as such court or judge shall think fit." Section 112 enacts, that, "where notice has been given to try by special jury, either party may, six days before the first day of the sittings in London or Middlesex, or adjournment-day in London, or commission-day of the Assizes, *give notice to the sheriff that such cause is to be tried by a special jury*; and, in case no such notice shall be given, no special jury need be summoned or attend, and the cause may be tried by a common jury, unless otherwise ordered by the court or a judge." And section 113 enacts, that, "in all cases where notice is not given to the sheriff that the cause is to be tried by a special jury, and by reason thereof a special jury is not summoned or does not attend, the cause may be tried by a common jury, to be taken from the panel of common jurors in like manner as if no proceedings had been had to try the cause by a special jury." By these enactments, two things were intended to be provided for,—one, the general change in the mode of striking and summoning special juries,—the other, the trial of causes by common juries where the proper steps have not been taken to obtain the attendance of a special jury.] No notice is contemplated by the statute, or adopted in practice, except by the service of the rule upon the sheriff.

ERLE, C. J.—Whatever the notion may be that is entertained upon the subject, it is high time to dispel it. There will be no rule upon this point.

**Best* showed cause.—He submitted that the judge's order in effect made the cause a remanet; and that, finding that the [*110 associate so treated it, the plaintiff's attorney did not conceive a fresh notice of trial to be necessary.

Field, in support of the rule, on the authority of *Jacks v. Mayer*, contended that a fresh notice was necessary, and consequently that the trial was irregular. [WILLES, J.—The order of the learned judge operated rather like an injunction.]

PER CURIAM,—The rule must be absolute to set aside the trial, the costs to be costs in the cause. Rule absolute accordingly.

COURTENAY v. WAGSTAFF.

REED v. WAGSTAFF. Jan. 23.

Although the court is not bound by the exercise of discretion by the judge who tries the cause, in refusing to certify for costs where the verdict is under the limit, yet it will not upon light grounds interfere.

In an action for wrongfully dismissing the plaintiff from his employment as a parliamentary reporter for a newspaper, and also for work and labour, it was sought to fix the defendant with liability as a partner, upon the ground that he had advanced money for starting the paper, under a written agreement with one H., containing very stringent stipulations showing that the defendant was to have unlimited control over the publication, with the option of declaring himself a partner at any time within twelve months, and to trust solely to the profits for the repayment of his advance, with interest, and by parol evidence of personal interference in the management.

At the trial it was assumed that the agreement alone did not constitute a partnership between the defendant and H.; and the jury,—having found that the plaintiff's engagement was not for the session, but a weekly engagement only, and negatived that the defendant had prior to the

plaintiff's engagement allowed himself to be held out as a partner, but affirmed that he had done so since,—returned a verdict for the plaintiff for 15*l.* 15*s.* ; and the judge, though he certified for a special jury, refused to certify under the 13 & 14 Vict. c. 61, s. 12, that there was a sufficient reason for bringing the action in the superior court:—

The court, considering that the difficulty of the question as to the construction and effect of the agreement justified the plaintiff in resorting to the superior tribunal, made an order for costs under the 15 & 16 Vict. c. 54, s. 4.

THESE were actions brought by the respective plaintiffs against the defendant for wrongfully dismissing them from his employ in the capacity of reporters for a newspaper of which he was alleged to be the proprietor.

*111] *The first count of the declaration stated, that, in consideration that the plaintiff, at the request of the defendant, would enter into the employ of the defendant in the capacity of a reporter of certain proceedings, to wit, in the House of Parliament, and would furnish reports of such proceedings to the defendant, his servants or agents, for the purpose of publication in a public newspaper during a certain session of parliament at and for a certain salary or wages at the rate of 5*l.* per week through the said session of parliament, the defendant promised the plaintiff to retain and employ him the plaintiff in the capacity aforesaid at and for the salary or wages aforesaid, and continue him in such employ during the said session of parliament: Averment, that the plaintiff, confiding in the said promise of the defendant, did afterwards enter into the employ of the defendant in the capacity aforesaid, and on the terms aforesaid, and continued in such employ of the defendant in the capacity aforesaid and on the terms aforesaid, and did furnish reports of such proceedings as aforesaid to the defendant, his servants and agents, for the purpose of publication in the said public newspaper, for a certain space of time; that, before the commencement of this suit, all things had happened and occurred, and all times had elapsed, which it was necessary should occur, happen, and elapse to entitle the plaintiff to sue in this action for the defendant's breach thereafter mentioned of the said promise; that the plaintiff had always been ready and willing to do all things which it was necessary he should be ready and willing to do to entitle him to sue the defendant in this action for the said breach of promise: Yet that the defendant broke his said promise in this, that he did not continue the plaintiff in the said employment during the said session *112] of parliament, but, on the contrary, before the *same had ended, wrongfully dismissed the plaintiff from the said employment, whereby the plaintiff lost the salary and wages which otherwise would have accrued to him, and remained for some time unemployed.

There was also a count for money payable by the defendant to the plaintiff for work done and materials provided by the plaintiff for the defendant at his request, and for money found to be due from the defendant to the plaintiff on accounts stated between them.

The defendant pleaded to the first count,—first, that he did not promise as alleged,—secondly, that the plaintiff did not enter into nor continue in his the defendant's employ in the capacity or on the terms alleged,—thirdly, that he did not dismiss the plaintiff as alleged; and, to the common counts,—fourthly, never indebted. Issue.

The causes were tried together before Bramwell, B., at the last Summer Assizes at Kingston. The facts which appeared in evidence

were as follows:—Early in January, 1863, one Thomas Littleton Holt, who had been for many years connected with newspapers, and who, with the assistance of the defendant, proposed to revive a daily newspaper called *The Iron Times*, which he had carried on for about a year in 1845 and 1846, engaged the plaintiff and several others as reporters,—the plaintiffs Courtenay and Reed to report the proceedings in parliament, for which they were to receive one guinea per week until the commencement of the session, and then each a salary of five guineas. The paper commenced on the 12th of January, and was discontinued on the 18th of March. Holt received a salary of six guineas per week.

In order to show that the defendant was a partner with Holt in the undertaking, the following agreement, dated the 10th of January, 1863, was put in:—

*“Articles of agreement made and entered into this 10th day of January, 1863, between Thomas Littleton Holt, of, &c., [*113 Esq., of the one part, and William Racster Wagstaff, of, &c., of the other part: Whereas the said T. L. Holt is about to bring out and conduct a daily penny newspaper called *The Iron Times*: And whereas the said T. L. Holt has applied to the said W. R. Wagstaff to advance and lend him the sum of 1000*l.* for the purposes aforesaid, which the said W. R. Wagstaff has agreed to do, upon the terms and subject to the stipulations hereinafter expressed and contained: Now, it is hereby agreed by and between the said parties hereto in manner following, that is to say,—

“1. That the said W. R. Wagstaff shall on or before the signing of this agreement, pay to the said T. L. Holt the sum of 1000*l.*, to be applied by him in and about the editing, publishing, conducting, and establishing the said intended newspaper to be called *The Iron Times*:

“2. That the said T. L. Holt will assign to the said W. R. Wagstaff all plant and type, together with the copyright of the said paper, as a security for the said sum of 1000*l.* and interest:

“3. That the said sum of 1000*l.*, together with interest at the rate of 5*l.* per cent. on the same or on so much thereof as shall remain due, shall be a charge upon and payable out of the said paper:

“4. That the interest shall be payable quarterly, viz. on the 15th day of April, the 15th day of July, the 15th day of September, and the 15th day of January in every year; and the said principal sum of 1000*l.* shall be repayable by annual instalments of 200*l.* on the 15th day of January in each year:

“5. That, as a further security to the said W. R. Wagstaff, he the said W. R. Wagstaff shall during so *long as any part of the said 1000*l.* [*114 and interest shall remain unpaid, have the absolute appointment and power of removal of all clerks and servants to be appointed to conduct, carry on, and keep the books and accounts of the business of the said newspaper, and the receipts and payments of all moneys to be received and paid in respect of or connected with the said newspaper; but he is not thereby to incur any responsibility:

“6. That, as further part of the said agreement, the said W. R. Wagstaff shall have the option at any time within twelve calendar months from the date of this agreement of requiring an absolute assignment to be executed to him of three fourth parts or shares of and

in the said intended newspaper, and, upon the said W. R. Wagstaff notifying to the said T. L. Holt such to be his desire, within the aforesaid period, the said T. L. Holt agrees to assign to the said W. R. Wagstaff, or as he may direct, three fourth parts or shares of and in the plant, type and copyright of the said newspaper, for the absolute use and benefit of the said W. R. Wagstaff, or such person or persons as he may appoint :

"7. In case the said W. R. Wagstaff shall exercise the option reserved to him by the preceding clause of this agreement, he shall be at liberty to sell or assign the said three fourth parts or shares, or any part or parts thereof, to such person or persons and from time to time as he may think fit, without the consent of the said T. L. Holt :

"8. That the said T. L. Holt shall not part with or encumber his one fourth-share of and in the said newspaper without the previous consent in writing of the said W. R. Wagstaff first obtained, nor without having given the option to the said W. R. Wagstaff of becoming the purchaser on the same terms at which he is willing to sell *115] to such other person, which terms *shall be set forth in his notice to the said W. R. Wagstaff:

"9. That the said T. L. Holt agrees at any time hereafter to execute all proper deeds and instruments, and to do all other things that shall be necessary for giving effect to the intention of the said parties hereto; such deeds and instruments to be conclusively settled, and such things to be conclusively fixed and determined, in case of difference, by John Surrage, Esq., of Chancery Lane, barrister-at-law. As witness the hands of the said parties the day and year first above written.

"Received of W. R. Wagstaff, Esq., 1000*l*.
in pursuance of the above agreement."

There was also a considerable body of evidence tending to show that the defendant took an active interest in the concern, advancing very large sums of money for carrying it on, and personally superintending some of the details of management.

The plaintiffs, Messrs. Courtenay and Reed, and several other parliamentary reporters connected with various newspapers (one of whom had been editor of the Sunday Times), swore, that, according to their experience, extending in some instances over a great many years, an engagement of a parliamentary reporter was always understood to be an engagement for the entire session.

It was also proved, that, at the time the publication of The Iron Times was discontinued, three weeks' salary was due to each of the plaintiffs.

The defendant, who had never before had any connection with newspapers, stated that he entered into an agreement with Holt to advance him 1000*l*. under the terms mentioned in the written memorandum produced; that, at the time of signing that agreement, he gave *116] Holt a check for that sum, which Holt afterwards *returned, requesting him (the defendant) to be his cashier; that he accordingly at various times advanced large sums (amounting in the whole to about 2700*l*.) to Holt for the purpose of paying the printer, stationer, salaries, &c., for some of these advances taking Holt's acceptances

(which remained unpaid); that he never exercised his option of becoming a proprietor, nor ever in any way interfered as a proprietor in the management of the paper or in the engagement of any of the persons employed upon it. On cross-examination, he stated that Holt was not to be personally responsible for the 1000*l.*, but that for any advance beyond that sum he was.

Holt, who was called as a witness for the defendant, denied that there had ever been any arrangement between the defendant and himself other than that contained in the written agreement produced and that deposed to by the defendant himself, or that he had ever held out the defendant to any one as a proprietor of the paper. [This statement was contradicted by two of the plaintiffs' witnesses, who were recalled.] He also swore that he distinctly informed the plaintiff and the other persons he employed to write for the paper, that he was not in a situation to enter into lengthened engagements with them.

On the part of the plaintiffs it was contended that the engagement was a sessional one, that the agreement of the 10th of January, 1863, constituted a partnership between the defendant and Holt, or that at all events there was evidence for the jury that the defendant had with his assent been held out by Holt as the proprietor of the paper.

For the defendant it was insisted that there had been neither partnership nor holding out, and that the evidence showed that the engagement of the plaintiffs was a weekly one only.

*The learned judge told the jury that in his opinion the agreement of the 10th of January, 1863, negatived all notion [*117 of partnership between the defendant and Holt: and he left to them the following questions:—

"1. What damages they found as to each plaintiff?

"2. Was the defendant a whole or part proprietor from the beginning?

"3. Did he or did any one by his authority hold him out as a party liable before or at the time of the engagement?

"4. Did he or did any one by his authority do so after the engagement?

"5. Did Holt represent before the engagement that there was some principal or partner?

"6. Was it a sessional or a weekly hiring?"

The jury answered the second, third and fifth questions in the negative, and the fourth in the affirmative, and as to the sixth that it was a weekly engagement in each case.

A verdict was thereupon taken for the defendant, leave being reserved to each plaintiff to move to enter the verdict for him for 15*l.* 15*s.* on the answers as to the fourth and sixth questions.

The learned judge certified for a special jury, but declined to certify under the 13 & 14 Vict. c. 61, s. 12, that the action was fit to be brought in a superior court.

Denman, Q. C., in Michaelmas Term, accordingly in each case obtained a rule nisi "to enter a verdict for the plaintiff for 15*l.* 15*s.* on the finding of the jury as to holding out," or for a new trial on the ground of misdirection on the part of the learned judge "in

holding that the agreement had the effect of preventing the defendant from being liable; and on the ground that the learned judge did not sufficiently put to the jury *the question whether there was a
 *118] fresh weekly engagement after the holding out found by the jury."

Hawkins, Q. C., and Hannen, in Hilary Term, showed cause.—The agreement of the 10th of January, 1863, did not constitute a partnership between the defendant and Holt. *Gabriel v. Evill*, 9 M. & W. 297, is precisely in point. In May, 1839, a creditor of the firm of B. & S. proposed to become a partner with them, the terms of the intended partnership being, that A. should bring in 1000*l.* in money and 1000*l.* in goods, and should be entitled to one-third of the profits, and be a dormant partner; the name of the firm was to be changed to B., S. & Co., and the partnership was to date from the 1st of April, 1839, but A. *reserved to himself the option of determining, at any period within twelve months from that day, whether he would become a partner.* The name of the firm was altered accordingly, and a new banking account was opened in the name of B., S. & Co., and A. advanced the 2000*l.* to the firm, but within the twelve months he declared his determination not to enter into the partnership. It was held that A. was not liable for goods supplied to the firm after May, 1839, for that *he never became a complete partner.* Lord Abinger, in his summing up in that case, says,—1 Car. & M. 358,—“ I remember a case in which one Steele applied to Morris to take Steele’s son into partnership, and the terms were, that, if the son approved of the concern at the end of a year, the father was to be a partner, and the firm to be called by the name of Morris & Steele. Upon this 6000*l.* was advanced at once. During the year, Morris adopted the style of Morris & Steele, but Steele the father did not know of it, though his son did. And Lord Roslyn held in equity, and Thompson, B., and
 *119] a special jury, at law, that Steele was not *liable, on the ground that a mere advance of money on a prospective partnership, in contemplation of a partnership not finally agreed on, did not make a partner of the person who advanced the money.” In *Ex parte Davis*, In re Harris, 32 Law J., Bankruptcy, 68, in 1856, an agreement was entered into between J. Harris and R. F. Davis, under which the former was to carry on business during twenty-one years for the benefit of himself and of any person whom the latter might name within eight years. R. F. D. was to make advances, and to become surety to a bank for J. H.’s drafts, and the profits were to be applied, first, in payment of a salary and allowances to J. H., then in repayment of the advances made by R. F. D., with interest, and, subject thereto, were to belong, as to one-third to J. H., and as to two-thirds to the nominee of R. F. D. R. F. D. died in 1861, without exercising his right of nomination, and in 1863 J. H. became bankrupt. On application by the executors of R. F. D. to prove under the bankruptcy for the amount due to his estate under the arrangement, it was held that the agreement did not constitute a partnership between J. H. and R. F. D., and that the executors of the latter were entitled to prove. Lord Westbury, C., there says: “ No partnership can possibly arise until the person to become partner has been nominated by Davis; and I am by no means of opinion that there is any

present contract of partnership between Harris and Davis. And the criterion that there is not may be taken to be this, that, supposing Harris to have become bankrupt before Davis had nominated a partner, then any money reserved as profits to be hereafter distributed between the partners when the partnership was formed, would, by the operation of that bankruptcy, be the property of Harris, the power of creating the partnership being put an end to by the event of such bankruptcy." *After the decision of the House of Lords in *Wheatcroft v. Hickman*, 9 C. B. N. S. 47 (E. C. L. R. [*120 vol. 99), it will hardly be contended that the stipulation for the repayment of the advances out of the profits constitutes a partnership. The question resolves itself into one of agency: and that is disposed of by the finding of the jury. If there was no partnership in fact, the only remaining question is, whether the defendant is estopped by any act of his from showing the truth, according to the doctrine of *Pickard v. Sears*, 6 Ad. & E. 474 (E. C. L. R. vol. 31), 2 N. & P. 478, *Freeman v. Cooke*, 2 Exch. 654, and that class of cases. The rule laid down by Lord Denman in *Pickard v. Sears*, is, that, where one by his words or conduct wilfully causes another to believe the existence of a state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." To this Parke, B., adds a qualification in *Freeman v. Cooke*, that the party *means* his representation to be acted upon, and that it is acted upon accordingly. There is nothing in the evidence here to bring the present case within that rule.

Denman, Q. C., and *Prentice*, in support of the rule.—It is submitted that there was a clear misdirection here. The learned judge ought to have told the jury that the agreement of the 10th of January, 1863, constituted a partnership between Holt and the defendant; or, if he left any question to them at all, it should have been, whether upon the whole of the facts there was such a partnership. The arrangement was not intended to create the relation of debtor and creditor between the parties: this is clearly shown by the third clause. The principal was to be payable out of profits. In *Gabriel v. Evill*, partnership or no *partnership was treated as a question for the jury. [WILLES, J.—There was no writing there [*121 constituting the entire matter to be decided upon.] In *Ex parte Davis*, the circumstances were peculiar: there was nothing there to create a partnership except a deed, one of the terms of which was that there should be no partnership until the exercise of a certain option. Besides, the question there was of a partnership *inter se*. *Cox v. Hickman* and *Wheatcroft v. Hickman* was also a very peculiar case. The question there arose upon a deed of trust for the benefit of the creditors of a trading firm. When the case first came before this court (*Hickman v. Cox*, 18 C. B. 617 (E. C. L. R. vol. 114),) the court were unanimously of opinion,—upon the authority of *Owen v. Body*, 5 Ad. & E. 28, 6 N. & M. 448, qualified in *Janes v. Whitbread*, 11 C. B. 606,—that, as the trustees were to carry on the trade for the benefit of the creditors, whose respective debts were to be paid out of the profits of the concern, they (the creditors) thereby become partners. When the case came before the Exchequer Chamber,—

Hickman v. Cox, 3 C. B. N. S. 523 (E. C. L. R. vol. 91),—the judges were equally divided. On the case coming before the Lords,—Wheatcroft v. Hickman, 9 C. B. N. S. 47 (E. C. L. R. vol. 99),—they reversed the judgments of the courts below. The result leaves that case one of very little authority. It is quite evident that none of the learned lords who took part in the discussion meant to overturn any of the principles which have uniformly prevailed from *Ex parte Hamper*, 17 Ves. 403, before Lord Eldon, down to *Stocker v. Brockelbank*, 3 M'N. & G. 250, before Lord Truro, C., the leading one of which is, that, where one stipulates for a share of profits, he shall be liable for losses. Lord Campbell, C., said (p. 89): "I do not think that *Waugh v. Carver*, 2 H. Bl. 235, or *Owen v. Body*, 5 Ad. & E. 28 (E. C. L. R. vol. 31), 6 N. & M. 448, or any of the cases relied *122] upon by the plaintiffs, make *out a participation of profits under this deed to constitute a partnership." Lord Cranworth (p. 92) says: "It was argued, that, as the creditors would be interested in the profits, therefore they would be partners. But this is a fallacy. It is often said that the test, or one of the tests, whether a person not ostensibly a partner, is nevertheless in contemplation of law a partner, is, whether he is entitled to participate in the profits. This, no doubt, is in general a sufficiently accurate test; for a right to participate in profits affords cogent, often conclusive evidence that the trade in which the profits have been made was carried on in part for or on behalf of the person setting up such a claim. But the real ground of the liability is, that the trade has been carried on by persons acting on his behalf. When that is the case, he is liable to the trade obligations, and entitled to its profits, or to a share of them. It is not strictly correct to say that his right to share in the profits makes him liable to the debts of the trade. The correct mode of stating the proposition, is, to say that the same thing that entitles him to the one makes him liable to the other, viz. the fact that the trade has been carried on on his behalf, i. e. that he stood in the relation of principal towards the persons acting ostensibly as the traders, by whom the liabilities have been incurred, and under whose management the profits have been made." His Lordship then proceeds to observe upon the authorities, which he says do not throw much light on the subject. None of the observations in any of the judgments in that case at all trench upon the principles laid down by this court in *Barry v. Nesham*, 3 C. B. 641 (E. C. L. R. vol. 91). There, Nesham, the proprietor of a newspaper, agreed to sell all the plant of the office to Lowthin for 1500*l.*, to be paid, with interest, by instalments running over a period of seven years; Nesham under- *123] taking to *guarantee to Lowthin during the seven years the clear yearly profit of 150*l.* over and above the annual payments of principal and interest; and Lowthin, in consideration of such guarantee, agreed to pay all such surplus profits to Nesham until such surplus profits should amount to 500*l.*, if they should amount to that sum during the seven years; and that, if such surplus profits should during the seven years amount to 500*l.*, then Lowthin should pay, over and above the purchase-money and interest, and the 500*l.*, the existing liabilities of the newspaper, not exceeding 250*l.* The court held that Nesham,—Lowthin having admitted his liability by

suffering judgment by default,—was liable as a partner for the price of goods supplied to Lowthin's order for the use of the newspaper. In the course of the argument (p. 650), Maule, J., remarks that "Nesham is at all events interested in the profits of this newspaper to the extent of the 500*l.*:" and that is the principle upon which the judgment ultimately turned. "All the cases," says Wilde, C. J., seem to agree, that, whatever be the private stipulations between the parties themselves, an agreement for a participation in the profits constitutes a partnership as to third persons; for, it is but reasonable that one who stipulates for an interest in the profits should be held liable to those who supply the means of carrying on the trading concern out of which those profits are to arise." And this is the fair result of the authorities collected in the notes to *Waugh v. Carver*, in 1 Smith's *Leading Cases*, 5th edit. p. 833 et seq. [WILLIAMS, J.—We have it now upon the highest authority, that whether a man be a partner or not depends on whether or not the relation of agent exists. There are, no doubt, considerable difficulties in this; for, if the party were agent, he could be sued for an account, which is opposed to the doctrine of joint-tenancy. *ERLE, C. J.—A loan to a trader [*124 at 5 per cent. interest, without personal liability, but to be paid only out of the profits,—this, you contend constitutes a partnership?] Yes. [WILLIAMS, J.—Is it not necessary, in order to constitute a partnership, that the alleged partner should have an interest in the profits as soon as earned, as a co-owner, as was the case of *Barry v. Nesham*? Under this agreement, if the instalments of interest are paid regularly, the party advancing the money has no interest in the profits, no right to an account.] The defendant's rights under the agreement could only be ascertained by means of an account. In the notes to *Waugh v. Carver*, 1 Smith's *Leading Cases* 833 et seq., the question is thus treated:—"It is said that a participation in the profits indicates (a) a partnership. But the participation must be that of a person having a right to a share of the profits and to an account in order to ascertain his share, not that of a mere *servant* or *agent* receiving, in respect of his wages, a sum proportioned to a share of the profits, or which may be partly furnished out of the profits. The distinctions on this subject have run so fine that it will not be uninteresting briefly to review the principal cases, and endeavour to extract from them some rules for ascertaining when a particular contract falls under the head of *partnership*, when under that of ordinary *agency* or *service*." The learned editors then proceed to cite and comment upon *Dixon v. Cooper*, 3 Wils. 40, *Dry v. Boswell*, 1 Campb. 329, *Benjamin v. Porteus*, 2 H. Bl. 590, *Wilkinson v. Frasier*, 4 Esp. N. P. C. 182, *The Riby Grove*, 2 Rob. Adm. C. 52, *Mair v. Glennie*, 4 M. & Selw. 240, *Harrington v. Churchward*, 29 Law J., Ch. 521, *Wish v. Small*, 1 Campb. 331, n., *French v. Styring*, 2 C. B. N. S. 357 (E. C. L. R. vol. 89), *Helme v. Smith*, 7 Bingh. 709 (E. C. L. R. vol. 20), 5 M. & P. 744, *Brodie v. Howard*, *17 C. B. 109 (E. C. L. R. vol. 84), and *Mitcheson v. Oliver*, 5 Ellis & B. 419 [*125 (E. C. L. R. vol. 85); and observe,—“It seems very reasonable to allow persons sharing in the profits of an adventure carried on by

(a) In the earlier editions the word used was "constitutes."

them jointly to exclude, by express agreement, the relation of partnership from arising *as between themselves*, and at the same time to prohibit them from so excluding it *to third persons dealing with them*; for, the rights and liabilities of partners inter se have been created by the law for their own convenience, and quilibet protest renunciare juri pro se introducto. But, to allow a person on whose account the adventure is really prosecuted, and who receives part of the profits, to shield himself from the creditors of the firm under the plea that he receives them as an agent, would militate against the reason given by Eyre, C. J., in the principal case, who places the liability of a participant on the ground, that, by taking part of the profits, he takes from the creditors part of their security, and against the better reasons given in *Wheatcroft v. Hickman*." And, after referring to *Hesketh v. Blanchard*, 4 East 144, *Bolton v. Puller*, 1 B. & P. 546, *Rawlinson v. Clarke*, 15 M. & W. 292, and *Barry v. Nesham*, 3 C. B. 641 (E. C. L. R. vol. 91), they further say: "Upon the whole, the cases justify us in concluding, that, whenever it appears that the agreement was intended by the parties themselves as one of *agency or service*, but the agent or servant is to be remunerated by a *portion of the profits*, then the contract would be considered as *between themselves* one of ordinary *agency* (see *Geddes v. Wallace* 2 Bligh 270, *Rex v. Hartley*, Russ. & R. 139), but, as between them and third persons, one of *partnership*, provided the adventure was really carried on by them on their joint account: see *Smith v. Watson*, 2 B. & C. 407 (E. C. L. R. vol. 9), 3 D. & R. 751; *Ex parte Rowlandson*, 1 Rose, B. C. 91; *Green v. Beesley*, 2 N. C. 108, 2 Scott 164; *Ex parte* *126] *Langdale*, 18 Ves. 300; *Wheatcroft v. Hickman*, 9 C. B. *N. S. 47 (E. C. L. R. vol. 99). But that, if the agent or servant is to be remunerated, not by a portion of the profits, but, as in *Dry v. Boswell*, *Dixon v. Cooper*, and *Wilkinson v. Frasier*, by part of a gross fund or stock which is not altogether composed of the profits, the contract, *even as against third persons*, will be one of ordinary *agency*, although that fund or stock may include the profits, so that its value, and the quantum of the agent's reward, will necessarily fluctuate with their fluctuation." And, in conclusion, referring to the doctrine of holding out, they say,—“However, in order to fix a person with this description of liability, no particular mode of holding himself out is requisite. If he do acts, no matter of what kind, sufficient to induce others to believe him a partner, he will be liable as such.” The law is similarly laid down in *Story on Partnership*, §§ 15, 23, 27, 57–69, and the note 2 at p. 54; from which it may be assumed to be the opinion of that very learned jurist, that, under circumstances like those of the present case, a partnership would clearly be created. “A specific interest in profits has always been considered to constitute a partnership:” per Lord Eldon, in *Ex parte Hamper*, 17 Ves. 404. The same learned judge says in *Ex parte Langdale*, 18 Ves. 300,—“A man who is to have no profit may be a partner, if holding himself out as such; as, by lending his name. He may also be a partner when the contract is that he shall suffer no loss: and I agree it is not the less a partnership because part of the contract is that they are not to suffer by bad debts, the personal negligence of him who has the custody of the article, by fire, &c. *The*

true criterion is, whether they are to participate in profit. That has been the question ever since the case of *Groves v. Smith*."^(a) [ERLE, C. J.—That is too wide: every creditor who has a right to be *paid has to a certain extent a claim upon the profits.] A [*127 man who embarks money in a concern, looking for the re- payment of principal and interest only to the profits, thereby becomes a partner. The learned judge should at all events have told the jury,—as was done in *Kilshaw v. Jukes*, 32 Law J., Q. B. 217,—that, if what was done was done for the benefit of Wagstaff, they should find a partnership. Every stipulation in the agreement shows that Holt was a mere instrument in the hands of Wagstaff. In *Cornish v. Abington*, 4 Hurlst. & N. 549, 556, Pollock, C. B., says, that, "if any person by a course of conduct or by actual expressions, so conducts himself that another may reasonably infer the existence of an agreement or license, whether the party intends that he should do so or not, it has the effect that the party using that language, or who has so conducted himself, cannot afterwards gainsay the reasonable inference to be drawn from his words or conduct." If the plaintiff be not entitled to a new trial on the ground of misdirection, he is clearly entitled to enter the verdict for 15*l.* 15*s.* according to the finding of the jury, who, after much discussion, came to the conclusion that the defendant had at all events during the last three weeks of the time held himself out as a partner. [WILLIAMS, J.—As a partner or as a proprietor?] Both. Then, notwithstanding that the learned judge, though he certified for a special jury, declined to certify that the action was properly brought in the superior court, this court has authority under the 15 & 16 Vict. c. 54, s. 4, to make an order for costs, if satisfied that the action was properly brought. Seeing the nature of the question at issue, it can hardly be doubted that the plaintiff was well warranted in resorting to the superior tribunal. The court is not bound by the decision of the judge at nisi prius: *Hatch v. Lewis*, 7 Hurlst. & N. 367.

*ERLE, C. J.—I am of opinion that the rule should be made [*128 absolute in each of these cases to enter a verdict for the plaintiff for 15*l.* 15*s.*, but that there should be no new trial. The trial was evidently conducted most carefully with a view to avoid the necessity of sending the cause down again. Every question which could be suggested was left to the jury, and properly left; and there was evidence which justified their finding. One governing question was, whether the plaintiff was engaged for the session or from week to week. The jury found that it was a weekly engagement; and, if so, the plaintiff had been paid all he was entitled to, except salary for the last three weeks; and the rule the court is about to pronounce gives him that. Whether, therefore, the liability of Mr. Wagstaff should arise from the legal relation of partner as between him and Holt created by the agreement of the 10th of January, 1863, or because he held himself out or permitted himself to be held out as a partner with Holt, or because the relation of principal and agent subsisted between him and Holt, all that the plaintiff could recover would be 15*l.* 15*s.* for the three last weeks of his engagement, for

(a) Meaning *Grace v. Smith*, 2 Sir W. Bl. 998.

which the verdict is to be entered : and I cannot agree to look at the interests of other persons not parties to the record. In this view, it becomes a question not necessary to be answered, whether the agreement did constitute a partnership between the defendant and Holt. But, in coming to a decision as to whether or not we ought to grant a certificate for costs under the 15 & 16 Vict. c. 54, s. 4, that there was sufficient reason for bringing the action in this court, I feel bound to say that the question whether that agreement constituted a partnership between the defendant and Holt, or constituted the defendant a proprietor of the newspaper, was one the discussion of which called for as much elaborate argument, acuteness, and learned *129] *research as any which could arise in Westminster Hall upon the construction of a contract. If I were called upon to pronounce a decision, as to what, upon a review of all the authorities, was the true effect of the instrument, the inclination of my opinion unquestionably would be that the defendant thereby became a proprietor of the newspaper, without any power on the part of Holt to remove or to pay him off. Wagstaff is empowered to call for an absolute assignment of three-fourths of the concern; and Holt is prohibited from parting with the other fourth share without Wagstaff's consent. That being the view which I take of the agreement, I am called upon to decide whether or not it was a wrong thing on the part of the plaintiff to bring such a question to be tried in a superior court, instead of in the county-court. The clause in the act upon which this point arises, provides that, "in any action in which the plaintiff shall not be entitled to recover his costs by reason of the provisions of the 11th section of the 13 & 14 Vict. c. 61, whether there be a verdict in such action or not, if the plaintiff shall make it appear to the satisfaction of the court in which such action was brought, or to the satisfaction of a judge at Chambers, upon summons," amongst other things, "that there was sufficient reason for bringing such action in the court in which such action was brought, then and in any of such cases the court in which such action is brought, or the said judge at Chambers, shall thereupon by rule or order direct that the plaintiff shall recover his costs," &c. I should pause long before I came to the conclusion that a learned judge, in refusing to grant a certificate under this statute, had exercised a wrong discretion. I do not say that the court has no power to review what is done at nisi prius in this respect ; but only that, if the same point had been before the judge at the trial, *130] and he had exercised his discretion *upon it, I should have hesitated to interfere. At the trial, however, the construction of the agreement was taken to be clear : and the question which the court and jury had to try was assumed to be simply whether the plaintiffs' engagement was a sessional or a weekly engagement. That was a question which might very well have been answered in the county-court. It was most important to the interest of the defendant that he should know the extent of his liability under the agreement : and the able argument of the learned counsel for the plaintiffs has brought my mind to the conclusion that the matter was of such a nature as to justify a trial in Westminster Hall. The result is that the verdict will be entered for the plaintiff in each case for 15*l.* 15*s.*, and that we make an order for costs.

WILLIAMS, J.—I am of the same opinion.—I think there is no other course open to us in these two cases but to order a verdict to be entered for the plaintiff for 15*l.* 15*s.*, and to decline to grant a new trial. It is evident from all the facts that the finding of the jury negating a sessional engagement was well founded. The plaintiffs, therefore, could recover no more than 15*l.* 15*s.* For that purpose, it is immaterial whether the defendant was an actual partner or allowed himself to be held out as such. I agree with my Lord that we ought to hold that the cause was a proper one to be brought in the superior court: and I come to this conclusion without intending the slightest disrespect to my Brother Bramwell. I can quite understand why he should at first sight have thought that the agreement did not create a partnership, and therefore that there was no reason for bringing the action in the superior court. But, upon a closer view of the instrument, it does seem to me to raise very serious doubts indeed whether it *did not constitute the defendant a partner with Holt in the newspaper speculation. I strongly incline to think he was a [*131 partner. If it had been a bonâ fide deed for the purpose which it purports to contemplate, viz. merely to secure the repayment of the loan of 1000*l.*, with interest, I should have had great difficulty in saying that a partnership was created by it. But, when closely looked at, its terms are so extraordinary that one is driven to one of two conclusions, either that it did constitute a partnership, and so the jury were wrong in finding that the parties merely intended a security for a loan of money, or that it was a colourable mode of becoming in reality a partner or proprietor of the newspaper without incurring the responsibility of a partner. Upon the whole, I entertain such grave and serious doubts, that I have no hesitation in holding that the case was a proper one for the decision of a superior court, and that we are bound to certify accordingly.

WILLES, J., and KEATING, J., were engaged in the Court of Criminal Appeal.

Rules absolute to enter the verdict on the second Count in each case for 15*l.* 15*s.*

*IN THE EXCHEQUER CHAMBER. [*132

HILARY VACATION, 27 VICTORIA.

SHEPHARD and Another *v.* PAYNE and Another. *Feb.* 4.

Judgment of the Court of Common Pleas, 12 C. B. N. S. 414, affirmed.

The immemorial existence of fees of an office may be presumed from uninterrupted modern usage, unless there be some evidence given to the contrary.

The modern usurpation of an excess does not affect the title to the original fees.

Whether or not there may be an ancient fee varying in pecuniary amount from time to time with the changes in the value of money and other circumstances, and subject only to the restriction that it shall be reasonable,—*quære?*

THIS was an action brought to recover certain moneys alleged to have been improperly demanded and received by the plaintiffs for fees as registrars of the archdeaconry court of Colchester, in the diocese of Rochester, for attending the visitation of the archdeacon.

Upon the argument of a special case (in which the court were to draw inferences of fact), the Court of Common Pleas held that the fees demanded were legally payable, and were reasonable in amount: see the report, 12 C. B. N. S. 414 (E. C. L. R. vol 104).

The plaintiffs having brought error upon this judgment, the case was argued in the Exchequer Chamber on the 30th of November, 1863, before Pollock, C. B., Bramwell, B., Channell, B., Blackburn, J., and Mellor, J., by

Mellish, Q. C. (with whom was *Wills*), for the plaintiffs in error, and by

Coleridge, Q. C. (with whom was *Hannen*), for the defendants in error.

The following authorities were referred to on the part of the plaintiffs in error,—2 Inst. 533; 4 Inst. 274; Gibson's Codex 569; Lyndwood, pp. 49, 52, 53, 114; Sixth Decretal, B. 3, Tit. 20, ch. 1; Viner's Abridgment, *Fees* (E.); Bacon's Abridgment, *Fees* (A.), pl. 1; 4 Burn's Ecclesiastical Law, 26, 35; Kennett's Parochial Antiquities, *133] Vol. 2, pp. 248, 353, 364, 369; *1 Stephen's Laws of the Clergy, 227; 1 Bl. Com. 69; The Bishop of St. David's v. Lucy, 1 Salk. 134; Matthew v. Burdett, 2 Salk. 412; Veale v. Priour, Hardres 351; Goslin v. Ellison, 1 Salk. 330; Pollard v. Gerard, 1 Ld. Raym. 703, 1 Salk. 333, 12 Mod. 608, Holt 596 (E. C. L. R. vol. 3); Gifford's Case, 1 Salk. 333; Johnson v. Lee, 5 Mod. 231; Burdeaux v. Lancaster, 1 Salk. 332; Middleton v. Crofts, 2 Atk. 650, 2 Stra. 1056; Fleetwood v. Finch, 2 H. Bl. 220; Cooper v. Byron, 3 Y. & C. 467; Spry v. Gallop, 16 M. & W. 716; the statute regulating the fees of clerks of assize, 19 G. 3, c. 74. The following Canons of 1603 were also referred to and commented upon,—116, 117, 119, 123, 135, and 136.

The following authorities were referred to on the part of the defendants in error:—Co. Litt. 44 a, 368 b.; 4 Inst. 339; 2 Roll. Abr. 285, 645, *Prohibition*, pl. 6; Grubbam v. Grate, 2 Roll. R. 150; Comyns's Digest, *Courts* (N. 9.), *Ecclesiastical Persons* (C. 5.), *Prescription* (E. 1). (F. 4.), (F. 12.); Bacon's Abridgment, *Courts Ecclesiastical* (A. 8), *Fees* (A.), *Prerogative* (D. 2.), *Prohibition* (L. 1.); Burn's Ecclesiastical Law, *Courts*, §§ 3, 7, *Visitation*, 24; Pollard v. Gerard, 1 Ld. Raym. 703, 12 Mod. 608, Holt 596, 1 Salk. 333; Dr. Trevor's Case, 12 Co. Rep. 78; Ridley v. Pownell, 2 Lev. 136; Johnson v. Lee, 5 Mod. 231; Pitts v. Evans, 2 Stra. 1108; Saunderson v. Clagget, 1 P. Wms. 657; Godolphin's Abridgment, edit. 1687, ch. 8, §§ 1, 2, 4, 7, ch. 10, §§ 7, 21; Lyndwood 49, 50; Stillingfleet, Vol. 1, p. 236; Dr. Cardwell's Documentary Annals, Vol. 1, pp. 92, 145, 164, Vol. 2, p. 33; statutes 21 H. 8, c. 5, 37 H. 8, c. 17, 58 G. 3, c. 45, ss. 84, 85. The following Canons were also referred to and commented upon,—26, 53, 57, 76, 90, 109, 110, 111, 112, 113, 115, 116, 117, 118, 119, 121. *Cur. adv. vult.*

*134] *BLACKBURN, J., now delivered the judgment of the court:—This was an appeal from the decision of the Court of Common Pleas on a case in which power was given to draw inferences of fact.

The appeal was argued after last Michaelmas Term, before the Chief Baron, my Brothers Bramwell, Channell, and Mellor, and myself.

We are of opinion that the judgment of the court below ought to be affirmed.

By the Common Law Procedure Act, 1854, s. 32, the court of error is required to draw any inferences of fact from the facts stated in the case which the court where it was originally decided ought to have drawn. The inferences which the court below have drawn are stated in their judgment delivered by my Brother Willes,—12 C. B. N. S. 414 (E. C. L. R. vol. 104). We agree in them all; but the court appear to have thought it unnecessary to say whether the proper inference to be drawn from the facts was that fees of the fixed amounts of 7s. 6d. and 4s. 6d. were immemorial, as the fees “need not be of a fixed and ascertained, but may be of a reasonable amount:” and they drew the inference of fact that these amounts were reasonable. Mr. Mellish on the argument suggested that this meant, that, in point of law, there might be an ancient fee varying in pecuniary amount from time to time with the changes in the value of money and other circumstances, and subject only to the restriction that it should be reasonable: and he questioned the accuracy of this position.

Without expressing, or indeed forming, any opinion upon this question, we prefer to rest our judgment, affirming that of the court below, on this, that, in our opinion, the facts stated in the case are such that it should be presumed that the fees of 7s. 6d. and 4s. 6d. were immemorial fees attached to the office of registrar, if that presumption is necessary to give them validity.

*The facts stated in the case show, that, from 1727 to 1801, [*135 visitation fees of the unvarying amount of 7s. 6d. and 4s. 6d. were uniformly received. From 1801 to 1857 (when the present dispute originated), fees of a varying amount, but always slightly in excess of 7s. 6d. and 4s. 6d., were received. The amount in excess of 7s. 6d. and 4s. 6d. is not now claimed; and, if it were, the uniform receipt for seventy-one years (from 1727 to 1801) of the amounts of 7s. 6d. and 4s. 6d. would be overwhelming evidence that the excess was a usurpation. But the modern usurpation of an excess does not affect the title to the original fees of 7s. 6d. and 4s. 6d. These have been received from 1801 to 1857 as much as from 1727 to 1801: so that the title to them depends on an unbroken perception as of right for one hundred and thirty years. That does not in itself give any title: but, in favour of vested interests, and for the quieting of titles, the rule of evidence has been established, that, where there has been long-continued modern user of a right capable of a legal origin, the existence of that legal origin should be presumed, unless the contrary be proved. This presumption is not one *juris et de jure*, which cannot be rebutted; but neither is it one purely of fact, and only to be drawn when the jury really entertain the opinion that in fact the legal origin existed.

The true rule seems to be laid down by Lord Wensleydale (then Parke, B.) in *Jenkins v. Harvey*, 1 C. M. & R. 877, 894, where he says that the correct mode to direct a jury is, to tell them, that, from uninterrupted modern usage, they should find the immemorial existence of the payment (if that be necessary for its validity), unless some evidence is given to the contrary; or, as he says, in delivering the written judgment of the court on the second trial of the case,—2 C. M.

*136] & R. 407,—from proof that an office existed in 1752, **“the jury may and ought to presume it to be prescriptive, if that be necessary to make it valid, unless the contrary be proved.”*

The claim in that case was by the corporation of Truro for a metage due of 4*d.* per chaldron for coals in that port: and it was supported. I mention this as showing what is meant by the latter part of the sentence quoted. I suppose neither the Barons of the Exchequer nor the jurors, as antiquaries, believed that 4*d.* per chaldron was actually paid before Richard the First returned from the Holy Land: but the modern user was enough to cast upon the other side the onus of proving that it was a usurpation.

We think that, in the present case, the modern usage for one hundred and thirty years, to take fees of 7*s.* 6*d.* and 4*s.* 6*d.*, raises a strong presumption that visitorial fees of that amount were immemorial: and, though the other facts stated in the case are such as to raise an inference that the amounts had formerly been varying and lower in amount, we do not think they are sufficient to satisfy the onus cast upon those who seek to upset an enjoyment for so long a time, by showing the origin to be in usurpation.

We think, thinkfore, that, if it be necessary for the validity of these fees that fees of that amount should be immemorial, that presumption ought to be made.

In every other respect we agree with the reasons given in the judgment of the court below, which we think ought to be affirmed.

I am desired to add the following on behalf of

BRAMWELL, B.—I do not presume to differ from the opinion of the rest of the court: but, being satisfied with the reasons given by my Brother Willes in the court below, I think it right to say, that, for those reasons, I concur in affirming the judgment.

Judgment affirmed.

*137] *BAXENDALE and Others v. THE GREAT WESTERN RAILWAY COMPANY. Feb. 4.

Judgment of the Court of Common Pleas, 14 C. B. N. S. 1, affirmed.

By one of their acts of parliament (7 & 8 Vict. c. iii. s. 50), the Great Western Railway Company are empowered, whenever they shall act as carriers, to charge for the carriage of goods, &c., such sums as they may think expedient, within the limits pointed out by their acts of incorporation, provided such charges are made to all persons equally; and s. 51 authorizes them to enter into such arrangements as they may think fit, with reference, amongst other things, to the collection and delivery of such goods.

By a subsequent act (10 & 11 Vict. c. ccxxvi. s. 53) the company are empowered to charge for small parcels, “that is to say, parcels not exceeding 500*lbs.* in weight,” “any sum which they think fit.”

Upon the argument of a special case, the facts of which are set out *antè*, 14 C. B. N. S. 1 (E. C. L. R. vol. 108), the Court of Common Pleas,—dissentiente Erle, C. J.,—held, upon the authority of *Pickford v. The Grand Junction Railway Company*, 10 M. & W. 399, Parker

v. The Great Western Railway Company, 7 M. & G. 253 (E. C. L. R. vol. 49), 7 Scott N. R. 835, and *Baxendale v. The Great Western Railway Company*, 5 C. B. N. S. 336 (E. C. L. R. 94), that the company are still bound to charge *equally*, and cannot lawfully demand for the carriage of parcels from station to station a sum which shall include the cost of collection and delivery, and so impose an unequal burthen on those who do not require the performance of this latter service at their hands; and that money had and received will lie to recover back sums demanded and received in excess.

Error was brought upon this judgment, and the case **was* now argued in the Exchequer Chamber, before Cockburn, C. [*138 J., Martin, B., Crompton, J., Channell, B., Blackburn, J., Mellor, J., and Pigott, B.

The grounds of error assigned were as follows:—

"1. That the plaintiffs in error are entitled under their acts of parliament set out or referred to in the case to make the charges complained of, the amount charged for conveyance on the railway being within the authority given them by the said acts:

"2. That the rates complained of were charged to all persons alike; and it was open to the defendants in error to have availed themselves of collection and delivery by the company:

"3. That no partiality or unfairness as against the defendants in error existed:

"4. That the remedy of the defendants in error, if any, was not by action, but by the appeal given by the act."

Montague Smith, Q. C. (with whom was *Field*), for the plaintiffs in error (defendants below), urged substantially the same arguments which had been unsuccessfully put forward in the court below,—referring more particularly to the cases of *Pickford v. The Grand Junction Railway Company*, 10 M. & W. 399, *Stevens v. Jeacocke*, 11 Q. B. 731 (E. C. L. R. vol. 63), *Parker v. The Great Western Railway Company*, 6 Ellis & B. 77 (E. C. L. R. vol. 88), *Baxendale v. The Great Western Railway Company*, 4 C. B. N. S. 63 (E. C. L. R. vol. 93), and *Branley v. The South Eastern Railway Company*, 12 C. B. N. S. 63 (E. C. L. R. vol. 104); and to the statutes 7 & 8 Vict. c. iii. s. 50, 8 & 9 Vict. c. 20, s. 90, 10 & 11 Vict. c. ccxxvi. ss. 52, 53, and 17 & 18 Vict. c. 31, s. 6.

Bovill, Q. C. (with whom was *Ollivant*), was not called upon.(a)

(a) The points marked for argument on the part of the defendants in error (plaintiffs below) were as follows:—

"1. That the plaintiffs (below) are entitled to recover from the defendants (below) the sum of 443*l.* 10*s.* 2*d.*, which was improperly charged by the defendants (below), and paid under protest by the plaintiffs (below):

"2. That the defendants (below), by charging the same rate for goods which were carted by the plaintiffs (below) to and from the stations as they did for those which were carted by the defendants (below), demanded and obtained the payment of improper and unreasonable charges:

"3. That the defendants (below), by so charging, demanded and obtained the payment of charges which were improper and unreasonable, and which also were unequal and contrary to the provisions of the acts of parliament by which the defendants (below) are entitled to charge those who send goods by them:

"4. That the cost to the defendants (below) of carting goods to and from the stations, as well as carrying them on their line, must have exceeded the cost of carrying them on the line only; and that to the extent of this excess their charges have been improper, unequal, and illegal:

"5. That the mode of charging adopted by the defendants (below) before they disallowed the rebate for collection and delivery, supports the proposition contended for by the plaintiffs (below)."

*139] *COCKBURN, C. J.—We are all of opinion that the judgment of the Court of Common Pleas should be affirmed. The 50th section of the 7 & 8 Vict. c. iii. provides for equality of charge by the railway company in terms which are repeated in the 90th section of the Railways Clauses Consolidation Act, 8 & 9 Vict. c. 20. These sections in substance provide that the tolls shall be charged equally to all persons and after the same rate, whether per ton per mile or otherwise, in respect of all passengers and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway under the same circumstances; and that no reduction or advance in any such tolls shall be made either directly or indirectly in favour of *140] or against any particular company or person travelling *upon or using the railway. We agree with the majority of the court below in thinking that it is not competent to a railway company to superadd to the tolls which they are by act of parliament entitled to charge, a further sum for collection and delivery for those who do not require from them the performance of those services. Such a charge made to those who require the service to be performed for them might be reasonable; but it is manifestly unreasonable and unequal if imposed upon those who do not desire them. Mr. Smith has contended before us that the 53d section of the 10 & 11 Vict. c. ccxxvi. entitles this company to charge any sum at their discretion for articles under 500 lbs. in weight: but all that seems to us to follow from that section, is, not that the equality clauses in the 7 & 8 Vict. c. iii. and 8 & 9 Vict. c. 20 are repealed, but that the clause limiting the maximum of tolls is as to such articles repealed. If the company establish a tariff for articles under 500 lbs. in weight, such tariff must still be subject to the equality clauses.

As to the question whether an action for money had and received will lie,—which seems to have been one of the numerous points discussed in *Parker v. The Great Western Railway Company*, 6 Ellis & B. 77 (E. C. L. R. vol. 88),—we think, that, if the judgment of the Court of Queen's Bench in that case went the length of holding that it would not, this court ought not to be held bound by it. If the subject of these tolls had then undergone the discussion which it has since undergone in the Court of Common Pleas and elsewhere, in all probability the doctrine would not have been laid down as it was in that case. Upon the whole, we think the case is an extremely clear one: and we cannot help expressing a hope that it will not be carried further.

Judgment affirmed.

*141] *HORTON v. MABON. Feb. 4.

Judgment of the Court of Common Pleas, 12 C. B. N. S. 437, affirmed.

THIS was an appeal by the plaintiff against the decision of the Court of Common Pleas in discharging a rule obtained by him calling upon the defendant to show cause why a verdict should not be entered for the plaintiff in pursuance of leave reserved at the trial,

and also why a new trial should not be had, on the ground of misdirection.

The action was for the infringement of the plaintiff's patent for "Improvements in the construction of gas-holders." The pleadings and specifications are set out in the report of the case below, ante, 12 C. B. N. S. 437 (E. C. L. R. vol. 104). The court held that the plaintiff's alleged invention was not the subject of a patent.

The case was argued in the Exchequer Chamber, before Cockburn, C. J., Martin, B., Crompton, J., Channell, B., Blackburn, J., Mellor, J., and Pigott, B.

Webster (with whom was *Bovill*, Q. C.), for the plaintiff, contended, as in the court below, that the invention described in the specification was a new combination producing an improved gas-holder, and as such the subject of letters-patent; that the invention was a new manufacture; and that, upon the evidence, no gas-holder constructed according to the invention described in the specification was in use by others at the date of the letters-patent. The following authorities were referred to:—*Brunton v. Hawkes*, 4 B. & Ald. 541 (E. C. L. R. vol. 6); *Lewis v. Davis*, 3 C. & P. 502 (E. C. L. R. vol. 14); *Morgan v. Seaward*, 2 M. & W. 544; *Muntz v. Foster*, 2 Webster's Patent Cases 92, 6 M. & G. 734 (E. C. L. R. vol. 46), 7 Scott N. R. 471; *Crane v. Price*, 5 Scott N. R. 338, 4 M. & G. 580 (E. C. L. R. vol. 43); *Newton v. Vaucher*, 6 Exch. 859; *Harwood v. The Great Northern Railway Company*, 2 Best & Smith 194 (E. C. L. R. vol. 110).

**Hindmarch*, Q. C. (with whom was *Grove*, Q. C.), was not [*142 called upon.

COCKBURN, C. J.—We are all of opinion that the judgment of the Court of Common Pleas ought to be affirmed. That which the plaintiff claims as part of his invention, is, the substitution of *double angle-iron* for two pieces of *single angle-iron* in the formation of hydraulic cups or joints to telescopic gas-holders. Now, it was matter of general knowledge, that the cups might be formed by riveting two pieces of single angle-iron to a plate: and we agree with the Court of Common Pleas in thinking that the mere substitution of double angle-iron,—an article well known in the trade,—is not an invention for which a patent can be granted. Judgment affirmed.

ILDERTON v. JEWELL and COLLIN. Feb. 5.

Held, affirming the judgment of the Court of Common Pleas,—that a certificate given under the 198th section of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), of the filing of a deed under s. 192, which deed had been held to be void on the ground that it purported to be made between the debtor and such of his creditors as should execute the same, and therefore impliedly excluded from its benefits and provisions non-executing creditors, afforded no protection to bail who had undertaken to render the debtor in the Mayor's Court, London.

ERROR from the Court of Common Pleas, in an action commenced in the Mayor's Court, London.

The declaration was upon a recognisance of bail, in the usual form.

The defendant Jewell pleaded, that, after the making and coming into operation of the Bankruptcy and Insolvency Act, 1861, and at

the time of the execution of the deed by Louis Castrique thereafter mentioned, the said Louis Castrique (not being a bankrupt) was indebted to the plaintiff on the judgments *recovered against the said *143] Louis Castrique as in the declaration mentioned, and to divers other persons in divers large sums of money; and that, while the said Louis Castrique was so indebted as aforesaid, and after the making and coming into operation of the said act, to wit, on the 17th of January, 1862, and before the commencement of this suit, and before the issuing of the *capias* thereafter mentioned, a certain deed was made and entered into between the said Louis Castrique and certain persons then being and therein respectively described as creditors, and then executed by the said Louis Castrique, which said deed was made and entered into for the benefit of all the creditors of the said Louis Castrique, and related to the debts and liabilities of the said Louis Castrique and his release therefrom, and which said deed, together with a schedule thereunder written, and a certain attestation thereon, were in the words and figures following, that is to say, &c. (setting them out,—the deed being in the form set out in the case of *Ilderton v. Castrique*, 14 C. B. N. S. 99 (E. C. L. R. vol. 108),—not upon the face of it purporting to be for the benefit of all the creditors of Castrique). The plea then averred the due execution of this deed by three-fourths in value of the creditors of Castrique, the registration and other proceedings requisite to the validity of a deed of arrangement under the act, and a tender of the composition, and then proceeded as follows,—And the defendant says, that, although afterwards, to wit, on the 31st of March, 1862, a writ of *capias* was sued and prosecuted out of the said Lord Mayor's Court by the plaintiff against the said Louis Castrique upon the said judgment, as according to law and the custom and practice of the said Lord Mayor's Court there ought to have been, the same was sued and prosecuted out of the said Lord Mayor's Court after notice of the filing and registration *144] of the said deed *had been given as aforesaid, and after the issuing of the said certificate, and without leave of the court of bankruptcy; that, by reason of the premises, the said *capias ad satisfaciendum* was not and is not available to the plaintiff; and that, save as aforesaid, the plaintiff had not sued or prosecuted out of the said court any *capias ad satisfaciendum* against the said Louis Castrique upon the said judgment.

The defendant Collin pleaded a not very dissimilar plea.

The plaintiff demurred to both pleas, the ground stated in the margin being, "that the deed affords no answer to the action, as the deed is not binding on creditors who are not parties to it." Joinder.

The Court of Common Pleas gave judgment for the plaintiff upon these demurrers, holding that a certificate given under the 198th section of the Bankruptcy Act, 1861, of the filing of a deed under s. 192, which deed had been held to be void on the ground that it purported to be made between the debtor and such of his creditors as should execute the same, and therefore impliedly excluded from its benefits and provisions non-executing creditors, afforded no protection to bail who had undertaken to render the debtor in the Mayor's Court, London.

The case now came on for argument in the Exchequer Chamber,

before Martin, B., Crompton, J., Channell, B., Blackburn, J., Mellor, J., and Pigott, B.

Mellish, Q. C. (with whom was *J. H. Hodgson*), for the plaintiffs in error (defendants below). (a)—There are two *questions for the consideration of the court,—first, whether the deed set out in [*145 the plea is a valid deed under the 192d section of the Bankruptcy Act, 1861,—secondly, whether such deed (and the certificate of the filing thereof) affords an answer to an action on a recognisance of bail. The first, which was the only question argued in the court below, was disposed of by the case of *Idlerton v. Castrique*, 14 C. B. N. S. 99 (E. C. L. R. vol. 108), where the Court of Common Pleas held this deed to be a bad one, principally upon the authority of the judgment of Lord Chief Justice Turner in *Ex parte Rawlings*, 32 Law J., Bankruptcy 27. The question so determined now for the first time presents itself for decision in a court of error. The 192d section enacts that “every deed or instrument made or entered into between a debtor and his creditors, or any of them, or a trustee on their behalf, relating to the debts or liabilities of the debtor, *and his release therefrom, or the distribution, inspection, [*146 management, and winding-up of his estate, or any of such matters, shall be as valid and effectual and binding on all the creditors of such debtor as if they were parties to and had duly executed the same, provided the following conditions be observed,”—amongst others, that it shall be executed or assented to in writing by three-fourths in value of the creditors of such debtor whose debts shall respectively amount to 10*l.* and upwards, and shall be duly filed at the office of the chief registrar. It may be conceded that the deed must, to satisfy the act, be a deed which may enure for the benefit of all the creditors of the debtor. The requirements of the section are satisfied if it is capable of being executed by *all* the creditors. When executed by the requisite number of creditors, it is binding upon them all: and it is not necessary that the covenants should be with *all* the creditors; it is enough that they are with the creditors who are parties thereto. Here, the deed does enure for the benefit of all the creditors: it contains an express provision that it shall be void unless the composition shall be paid or tendered to all within one calendar month from its date and execution. [CROMPTON, J.—“To the said creditors,” that is “the said several creditors parties

(a) The points marked for argument on the part of the plaintiffs in error, were as follows:—

“1. That the defendants are sued as sureties, and the deed for the benefit of the creditors of the principal debtor, *Castrique*, set out in the plea, is binding on the plaintiff under the Bankruptcy Act, 1861, s. 192:

“2. That the plea shows that the said *Castrique* has duly performed all the conditions required by the said deed, so as to entitle himself to the benefit thereof:

“3. That, after notice of the filing and registration of the said deed under the said Bankruptcy Act, 1861, no writ of execution could be executed against *Castrique* without leave of the court of bankruptcy, and that no leave was obtained; and that, before the defendants could be fixed as bail, the plaintiff was bound to have issued an available writ of execution against *Castrique*:

“4. That the certificate of the filing and registration of such deed given to *Castrique* under the 198th section of the Bankruptcy Act, 1861, was thereby available to *Castrique* for all purposes as a protection in bankruptcy, and could only be set aside by a superior tribunal:

“5. That, in granting the said certificate, the registrar of the court of bankruptcy acted judicially; and the defendants could not be compelled to incur the risk of arresting *Castrique* in defiance of the protection afforded to him by the said certificate.”

thereto of the second part." The deed being capable of execution by *all* the creditors, it is, when executed by three-fourths, to be construed as if *all* had executed or assented to it. By s. 193, the particulars of the deed are to be entered by the chief registrar, and published in the Gazette, when duly executed by the requisite parties and when all the other preliminaries have been duly observed. [CROMPTON, J., referred to *Larpent v. Bibby*, 5 House of Lords *147] Cases 481, where it was held that such a deed was void if it *only provided for distribution amongst those creditors who were parties to it.] No doubt, the deed must be such that all the creditors may avail themselves of it. The cases of *Ellis v. Ollave*, 3 Salk. 60, and *Feltham v. Cudworth*, 2 Ld. Raym. 760, 3 Salk. 59, Comyns 112, 7 Mod. 10, though they made no impression upon the court below, do, it is submitted, strongly support this argument. The cases of *Ex parte Morgan*, in re Woodhouse, 32 Law J., Bankruptcy, 15, *Ex parte Rawlings*, 32 Law J., Bankruptcy, 27, and *Ex parte Godden*, in re Shettle, 32 Law J., Bankruptcy, 37, contain mere obiter opinions: neither of them is a *decision* upon the points under consideration. Nor is there any actual decision which is binding upon this court. A very elaborate exposition of the 192d section is also given by Lord Westbury, C., in *Ex parte Spyer*, in re Josephs, 32 Law J., Bankruptcy, 62.

The next question is, whether the deed is an answer to an action upon a recognisance of bail. Although it was held in *Donnelly v. Dunn*, 2 Bos. & P. 45, that bail cannot plead the bankruptcy and certificate of their principal in their own discharge, it is difficult to see upon what principle that decision rests. "The recognisance of bail is in the alternative, to pay the damages in case the principal does not pay them or render himself:" per Abbott, C. J., in *Newington v. Keeys*, 4 B. & Ald. 493. It has always been understood that the bail were discharged where there was no ca. sa. against the principal: Comyns's Digest, *Bail* (Q. 5), (R. 5); *Devered v. Ratcliffe*, Cro. Eliz. 185; *Masters v. Lewes*, 5 Mod. 93; *Dudlow v. Watchorn*, 16 East 39: and see Brandon's Practice of the Mayor's Court, 111. If the deed here was a good one, there could be no ca. sa. against Castrique without the leave of the Court of Bankruptcy; and none was obtained.

*148] *Manisty*, Q. C. (with whom was *Joyce*), for the defendants in error.(a)—The only authority in favour of the validity of this deed is the dictum of Lord Holt in *Feltham v. Cudworth*, 2 Lord Raym. 760, 3 Salk. 59, Comyns 112, 7 Mod. 10. And the authorities are numerous to show that a deed in this form is binding only

(a) The points marked for argument on the part of the defendant in error were as follows:—

"1. That the deed set out in the plea affords no answer to the action, as the deed is not binding on the creditors who are not parties to it:

"2. That, when there is no *cessio bonorum* on the part of a bankrupt or insolvent, the majority of a body of creditors cannot bind the minority to a composition:

"3. That the pleas do not show that the requisite majority executed the deed; for, the defendants by their pleas may intend a majority of the unsecured creditors:

"4. That non-existing creditors are excluded from the benefit of the deed:

"5. That the deed is unreasonable in its provisions:

"6. That, although the deed may be binding under the bankrupt law as between the parties thereto, it cannot affect strangers."

upon those creditors who execute it. It is enough to refer to *Legg v. Cheeseborough*, 5 C. B. N. S. 741 (E. C. L. R. vol. 94), and *Walter v. Adcock*, 7 Hurlst. & N. 541. [CROMPTON, J.—It is not a question who should be parties to the deed, as it may be between the debtor and a trustee for the creditors; but the question is whether the deed enures for the benefit of all the creditors.] Precisely so. A deed whereby the effects of the debtor are assigned to trustees for the benefit of such creditors as shall execute it within a given time, is bad: *Copeman v. Hart*, 14 C. B. N. S. 91 (E. C. L. R. vol. 108); *Dewhurst v. Kershaw*, 1 Hurlst. & Colt. 726. In *Ex parte Cockburn*, in re Smith, 10 Law Times N. S. 252, a deed of composition was entered into between the debtor of the first part, the creditors whose names and seals were subscribed and *set in the schedule of [*149 the second part, and all others (if any) the creditors of the third part. The deed recited that the debtor proposed to pay to all his creditors a composition of 3*d.* in the pound, and that the persons whose names and seals were thereto set and subscribed had agreed to accept such composition and to give a release. It then witnessed, that, in consideration of the composition of 3*d.* in the pound in hand on the amount of their respective debts as mentioned in the schedule, paid by the debtor to the parties of the second part, and in consideration of the covenant therein contained, the parties of the second part thereby released the debtor, &c.: and the debtor thereby covenanted with the parties thereto of the second and third parts to pay them a composition of 3*d.* in the pound. The schedule comprised the names and seals of some creditors who had executed the deed. It also mentioned the names of other creditors who had not executed; and it did not appear that there were any creditors whose names did not appear in one way or the other in the schedule: and no other names than those thus comprised were taken in before the registrar. But the effect of the deed and schedule taken together, was, that the schedule was incorporated into the deed so far only as it contained the names of the executing creditors. It was held by Lord Westbury, C., that the deed was not a valid deed under s. 192, on the ground that the parties who had not executed it had not the same right to sue the debtor on the covenant as those who had; and, further, that the inequality in status between those creditors who came in before registration, and got the composition paid to them in hand, and those creditors who, if the deed had been differently framed, would have had a right to sue under the covenant, was sufficient to render the deed *not binding on those creditors who had [*150 not actually executed it.

Mellish was heard in reply.

MARTIN, B.—Five at least, if not all the members of the court, are of opinion that the judgment of the court below should be affirmed. I think it ought to be affirmed on the judgment suggested by my Brother Crompton, viz. that the said deed professes to be for the benefit of those creditors only who should execute it. As to the construction of the 192*d* section, there is no difference of opinion. That section enacts, that, “where a deed has been entered into between a debtor and his creditors,”—that would mean *all* his creditors; but the clause goes on,—“or any of them, or a trustee on their behalf,”—that is,

on behalf of *all*,—"relating to the debts and liabilities,"—which which must mean *all* the debts and liabilities, &c.,—"then it shall be effectual and binding on all the creditors as if they were parties thereto and had duly executed it." Does this deed apply to all the debts and all the liabilities of all the creditors of Castrique? In my judgment it does not. I think it applies only to those creditors who have executed it, and whose debts are set out in the schedule; non-executing creditors being thrown overboard. It is confined to the creditors parties thereto of the second part (the executing creditors), and to the debts set out in the schedule; and it excludes those who do not so execute. A deed in that form manifestly fails to satisfy the requirements of the statute. Of this opinion were the four judges of the court below; and five members of this court concur in that opinion. The person who drew this deed,—which is evidently taken from an old book of precedents,—could not have had the provisions of this *151] act of parliament in his *mind at the time. With every desire to give effect to those provisions, and to place no undue impediments in the way of those who may seek relief under the act, I feel bound to hold this to be a bad deed. I cannot help thinking that a person of ordinary ability, having the act of parliament before him, would find no difficulty in framing a good deed.(a)

CROMPTON, J.—I am entirely of the same opinion. I am equally desirous with my Brother Martin that the fullest effect should be given to deeds of arrangement under the Bankruptcy Act; and I have always wished that there had been some general form of deed sanctioned by the legislature.(b) The enactments now under consideration have given rise to a great number of questions: but I believe we are all agreed in Mr. Mellish's proposition, that it is enough that the deed should appear to be *for the benefit of all the creditors*; and that it is not necessary that it should be made between the debtor and all his creditors: it may be between the debtor and some of his creditors, or a trustee on behalf of all. The 192d section of the act requires in terms that there shall be a provision for all the creditors: and it seems to me to make no difference whether you expressly exclude some of them, or merely leave them out. It seems to have been decided that there need be no *cessio bonorum*,(c) but that these *152] deeds are to be dealt with in the same *manner as trust property under a *cessio bonorum*. The vice of this deed is, that it contains no provision for non-executing creditors: it professes to be made between the debtor and those creditors whose names are set down in the schedule; the words "the said several creditors parties hereto of the second part," or equivalent words, are used throughout the instrument. All through the deed there is not a word to indicate that any but executing creditors are to take any benefit under it. In a late case in the Exchequer,(d) it was held that there must not only

(a) Several of these deeds have since been sustained in the Queen's Bench, Exchequer (*Strick v. De Mattos*, 12 Weekly R. 963), and Exchequer Chamber.

(b) The general form given by s. 200 has not been very successful, inasmuch as it has been held not to be pleadable as a bar to an action by a dissentient creditor: see *Byre v. Archer*, post, Trinity Term.

(c) See *Clapham v. Atkinson*, 12 Weekly R. 342.

(d) *The Ipstone Park Iron Ore Company (Limited) v. Pattinson*, 9 Law Times N. S. 806. There, the defendant, a trader, by a composition-deed under s. 192 of the Bankruptcy Act, 1861,

be a provision for all the creditors, but a release by all: and in *Spitzer v. Chaffers*, 14 C. B. N. S. 686 (E. C. L. R. vol. 108), the Court of Common Pleas held, that, as the provision must be for all the creditors, so all must release: but, at all events, the deed must enure for the benefit of all. The only other matter which I would mention with reference to the *able argument of Mr. Mellish, [*153 that the non-executing creditors are in the same position as those who have executed this deed, is, that the executing creditors alone could object to any provision contained in the deed. It is true, the 192d section says that a deed executed by three-fourths in value of the creditors whose debts amount to 10% or upwards "shall be as valid, effectual, and binding on *all* the creditors of such debtor as if they were parties to and had duly executed the same." But I do not think that puts all the creditors in the same position, unless the deed is made for the benefit of all: the non-executing creditors do not appear to me to be in every point of view in the same position as these who execute. Assuming that they are, the deed makes no provision for them. I therefore think that this is a bad deed, and that the judgment of the Common Pleas should be affirmed.

CHANNELL, B.—I agree with my Brothers Martin and Crompton, that the judgment of the court below should be affirmed, and on this short ground, viz. that the deed must be a deed which provides for all the creditors, and relate to all the debts and all the liabilities of the debtor, and that there is nothing to satisfy me that that is the case with this deed.

BLACKBURN, J.—I should not venture to reverse the decision of the Court of Common Pleas without further consideration; but at present I am not prepared to assent to it, and if I had to decide the case I should require time to consider my judgment. My impression is, that this is a good deed. I agree that the deed, to be a valid deed under the act, must be one which relates to all the creditors; and that, if it excluded any, or did not provide the same benefit for all, *it would not be binding upon those who did not execute it. [*154 But, as at present advised, I think the effect of the 192d section, which says that "every deed or instrument made or entered into between a debtor and his creditors, or any of them, or a trustee on their behalf, relating to the debts or liabilities of the debtor and his release therefrom, or the distribution, inspection, management, and winding-up of his estate, or any of such matters, shall be as valid and effectual and binding on all the creditors of such debtor as if they were parties to and had duly executed the same,"—provided a majority representing three-fourths in value of his creditors shall exe-

made between himself and a trustee on behalf of and with the assent of the undersigned creditors, conveyed to such trustee all his estate absolutely, to be applied for the benefit of his creditors in like manner as if he had been at the date thereof duly adjudged bankrupt, and the creditors assenting thereto thereby agreed to accept the sum of 5s. in the pound in discharge of their respective debts, to be paid within twelve months from the date of the deed. The deed was executed by the requisite number of creditors, and all the other statutory requisites were complied with. In an action by the plaintiff, a non-assenting creditor, the Court of Exchequer held that the deed, though valid under the act as a composition-deed, and available for all purposes in bankruptcy, yet, as it contained in terms no release of the debtor from his debts, was not pleadable in bar to the action, and did not operate as a statutable release in answer to the plaintiff's claim.

cute the same and certain other conditions are complied with, is, as Mr. Mellish has argued, to say, that, though the deed has only been executed by a portion of the creditors, it shall be binding upon all; and that the true construction of the section is, that, if the deed provides for all the debts and liabilities of the debtor, and enures for the benefit of all the creditors, as soon as the required number of the creditors have executed it, the deed is as valid, effectual, and binding as if every creditor had duly executed it: and for this it is necessary to show that the deed did enure for the benefit of all the creditors. At present, I must confess I have great doubt whether you can show by parol that the deed is for the benefit of all the creditors, when it appears on the face of it to be for "the said several creditors parties hereto of the second part," that is, those creditors whose names are signed to the schedule. I am inclined to believe that this deed was intended to be for the benefit of the whole of the creditors of Castrique: but still not without some doubt. If it had purported on the face of it to be a deed under the Bankruptcy Act, or that it was for the benefit of all, I should have assented to the *argument of Mr. Mellish. *155] The minor objections seem to me to have been answered,—especially that with respect to all the creditors, both executing and non-executing, having the same remedy to recover the composition: but it is unnecessary to discuss them further. I will not say at present that I dissent from the judgment of the rest of the court; but I do not quite assent.

MELLOR, J.—I agree with the majority of the court that the judgment of the Court of Common Pleas should be affirmed. The deed, to be a valid deed under s. 192, must be a deed between the debtor and all his creditors, or between the debtor and a majority of his creditors whose debts amount to three-fourths of the whole, or between the debtor and a trustee for his creditors; but, in the two latter cases, it must be a deed which may enure for the benefit of *all*. The deed now under consideration seems carefully to exclude the non-executing creditors: and, when you come to look at the reservation of securities,—“without prejudice to any security which the said creditors *parties hereto* may hold for their respective debts,”—that is, the debts set out in the schedule,—it seems to strengthen the notion that the deed was intended to refer only to those creditors who should execute it: and the composition is only to be tendered to “the said creditors.” I agree with my Brother Crompton that it must appear on the face of the deed that the non-executing creditors are provided for. I do not go into the minor objections. I agree with my Brother Blackburn that most of these have been answered.

PIGOTT, B.—I am of the same opinion. With the most sincere *156] desire to give the fullest effect to this *act of parliament and to deeds executed under it, I can find nothing in this deed to bind Mr. Ilderton. To satisfy the requirements of the statute, the deed must be one which embraces and enures for the benefit of all the creditors. This the present deed fails to do: and therefore I agree with the majority of the court that the judgment of the court below should be affirmed.

Judgment affirmed.

CASES

ARGUED AND DETERMINED

IX. THE

COURT OF COMMON PLEAS,

Easter Term,

IN THE

TWENTY-SEVENTH YEAR OF THE REIGN OF VICTORIA. 1864.

The Judges who usually sat in Banc in this Term, were,—

ERLE, C. J.,

WILLES, J.,

BYLES, J.,

KEATING, J.

PEARSON and Another v. TURNER. *April 16.*

A defendant in ejectment will only be allowed to deliver interrogatories to the plaintiff under the 51st section of the Common Law Procedure Act, 1854, where his affidavit discloses special circumstances which satisfy the court or judge that justice requires it.

Stoate v. Rew, 14 C. B. N. S. 209 (E. C. L. R. vol. 108), confirmed, and *Flitcroft v. Fletcher*, 11 Exch. 543, overruled.

GATES, on a former day, obtained a rule nisi to rescind an order of Byles, J., for the delivery of interrogatories to the plaintiffs under the 51st section of the Common Law Procedure Act, 1854. The affidavit on which the order had been obtained,—that of the defendant and her attorney,—stated “that the action was brought to recover the possession of certain lands and premises; that the defendant had a good defence to the action on the merits; that the defendant (and her attorney) believed that the defendant would derive material benefit in this cause from the discovery which she sought by the interrogatories; and that the application was made bonâ fide, and not for the purpose of delay.” The learned judge made the order, upon the authority of *Flitcroft v. Fletcher*, 11 Exch. 543. [BYLES, J.—I distinctly intimated that I should not have made the order, but for the authority of that case.] *Stoate v. Rew*, 14 C. B. N. S. 209 [*158 (E. C. L. R. vol. 108)], is a distinct authority to show that so general an affidavit as this will not justify an order, but that special

circumstances must be shown,—such as, length of possession, and total ignorance of the nature of the case which the defendant is called upon to meet. Erle, C. J., there says: “As a general rule, it is not permitted to a party to interrogate his opponent as to how he means to prove his case, unless there be very special circumstances. If a man has been long in possession of an estate, and a stranger comes to dispossess him, the defendant may call for some general information as to the nature of the title which is to be made against him. But it must necessarily be very much a matter of discretion, depending upon the particular circumstances of each case.” And Willes, J., said: “If it had been shown that the defendant was wholly ignorant of the title intended to be set up against him, and therefore was utterly unprepared to shape his defence, the case might have been a proper one for the exercise of the jurisdiction. No special circumstances, however, are shown.”

Prentice now showed cause.—The question is whether this court will follow the precedent of *Flitcroft v. Fletcher*. There, the following interrogatories were allowed to be put by the defendant to the plaintiffs in an action of ejectment,—“1. In what character or in what right do you and each of you claim to be entitled to the possession of the premises claimed by you in this action? 2. Do you or any of you claim to be entitled as heirs-at-law of Henry Flitcroft, deceased? 3. If so, how do you allege that you or any of you are his heirs-at-law? and through what links do you trace such heirship? 4. Do you or any of you claim to be entitled as grantees from or trustees for *159] any person or *persons claiming to be heirs-at-law of the said Henry Flitcroft? 5. If so, who is or are the persons whose grantees or trustees you or any of you claim to be? and how do you allege that such person or persons is or are the heirs-at-law of the said Henry Flitcroft? and through what links do you trace such heirship? 6. Have you or any of you any right to or interest in the said premises, except as aforesaid? and, if so, what is the nature of such right or interest?” Nothing is there said as to the form of the affidavit, or the necessity of showing special circumstances. Alderson, B., in giving judgment, says:—“The court has a general power to require a person who seeks to disturb the possession of another to say by what right he does so. It has been the constant practice in actions of ejectment, where the declaration is vague, to order the delivery of particulars of the land sought to be recovered: then, why should not the plaintiff be required to say in what character and from what he claims?” It is to be observed that this is an appeal from a judge at Chambers. If he thinks fit to make the order upon the general affidavit, the burthen of proof is altered; and the party seeking to impeach the decision should at least come prepared with an affidavit showing some ground for so doing. In *Stoate v. Rew*, the learned judge had refused to make an order.

Gates was not called upon to support his rule.

ERLE, C. J.—I am of opinion that the facts disclosed here are not sufficient to give the defendant a right to interrogate the plaintiff in the manner sought. As to the right of the court or a judge to order interrogatories, the judgment of this court in the case of *Stoate v. Rew*, 14 C. B. N. S. 209 (E. C. L. R. vol. 108), points out the princi-

ple upon which the discretion ought to be *exercised, viz. [*160 where the affidavit discloses the fact of the defendant having long been in undisputed possession of the premises sought to be recovered, and being ignorant of the nature of the title started upon him. It is but reasonable, that, where a stranger comes to dispossess a party who has enjoyed for a long period, the party thus molested should be allowed to call for some general information as to the nature of the title which is to be relied on.

WILLES, J.—I am of the same opinion. *Flitcroft v. Fletcher* has given rise to such misconstruction. You may have an order for interrogatories in ejectment: but it is wrong to suppose that it is usual to grant such an order upon an affidavit which merely in terms satisfies the requirements of the statute. The judge, before he grants the order, must be satisfied that the interrogatories are necessary and proper. This is an unusual case. It is calling upon a person who claims to be entitled to the land to state in what character he claims it. That may be very inconvenient in many cases. It may be extremely difficult to define the precise nature of the claim. Such interrogatories, therefore, ought not to be allowed unless some special reasons for it are shown, such as that the defendant's possession is assailed by one as to whose case he is wholly ignorant, and consequently that he is in the dark as to how his defence is to be shaped.

KEATING, J.—I think the rule has been well laid down by my Lord and my Brother Willes.

BYLES, J., concurring,

Rule absolute.(a)

(a) See *Horton v. Bott*, 2 Hurlst. & N. 249.

*THOMAS BAYLEY, Collector of Rates for the Local Board of Health of the Borough and Corporate District of Wolverhampton, Appellant; JOSEPH WILKINSON, Respondent. [*161 April 29.

By the 69th section of the Public Health Act, 1848 (11 & 12 Vict. c. 63), power is given to the local board, in case any street (not being a highway) be not sewered, levelled, paved, &c., to their satisfaction, by notice to the owners or occupiers of premises abutting thereon to require them to sewer, level, pave, &c., the same within a given time; and, if such notice be not complied with, the local board may execute the works therein referred to; and "*the expenses incurred by them in so doing*" are to be paid by the owners in default, according to the frontage of their respective premises, and in such proportions as shall be settled by the surveyor, or, in case of dispute, by arbitration, as pointed out by s. 123:—

Held, that a notice informing the owners that the street was not "sewered, levelled, paved, flagged and channelled, metalled, and made good to the satisfaction of the board," and requiring the parties within one month to sewer, level, &c., the same, and intimating that in default the works would be executed by the board, was sufficient, without going on to specify the breadth, level, or any other particulars,—the notice containing a note at the foot,—"*Particulars of the necessary works may be obtained from the borough surveyor, Office, No. 3, Town Hall,*" where plans and specifications were lodged.

Held also, that the power of the arbitrator under s. 123, is limited to an inquiry into the apportionment of the expenses amongst the several owners of property liable to contribute; and that he is not entitled to inquire whether the gross amount of the expenditure was reasonable or necessary,—dubitante Willes, J.

The local board on the 8th of April, 1861, gave notice to the owners of certain property under s. 69, and on default being made, executed the works themselves, and by their surveyor apportioned the expenses amongst the several owners, and on the 11th of March, 1862, de-

manded payment. The landowners on the 10th of June gave notice to the board that they disputed the proportion settled by the surveyor to be due from them in respect of the works executed by the board, "on the ground that the cost of the said works was excessive and unfair." The board, treating this notice as a nullity, issued summonses against the owners, which summonses were on the 11th of October dismissed. On the 14th of October, the landowners gave notice to the board that they abandoned their notice of the 10th of June, and that they did not dispute the *proportions* of the expenses incurred by the board. Notwithstanding this, the board afterwards, on the 18th of October, gave notice of arbitration, and appointed an arbitrator, who on the 31st of December made his award,—slightly reducing the demand:—

Held, that, there being no longer any matter in dispute, the appointment of the arbitrator was void, and his award consequently incapable of being enforced.

THIS was an appeal against a decision of a magistrate, on a case stated under the 20 & 21 Vict. c. 43:—

At a petty sessions of the peace holden at Wolverhampton on the 17th and 24th of June, 1863, the respondent, Joseph Wilkinson, was summoned before the stipendiary magistrate for refusing to pay his proportion of certain expenses incurred by the local board of health for the borough of Wolverhampton, for certain works executed by them, together with certain costs. The summons stated that certain *162] expenses had *been incurred by the local board of health of the said borough and corporate district in sewerage, levelling, paving, flagging and channelling, metalling, and making good certain streets called respectively Bromney Street, Sedgley Street, and Duncan Street, in the said borough and corporate district, to or upon which said streets respectively certain premises belonging to the respondent fronted, adjoined, or abutted, and that the proportion of expenses he was liable to pay, according to the frontage of his premises in the said streets respectively, having been settled by the surveyor of the local board at the sum of 97*l.* 19*s.* 5*d.*, and having been disputed by the respondent, was settled by arbitration by the award of R. Kettle, Esq., made pursuant to the statutes in that behalf, and dated the 31st of December, 1862, at the sum of 92*l.* 7*s.* 6*d.*, and which sum, being such proportion of the expenses as aforesaid, together with 23*l.* 3*s.* 10*d.*, being the amount of the costs of the proceedings incurred by the said board in that behalf, he had neglected to pay, contrary to the statute in such case made and provided."

The magistrate dismissed the summons, and the appellant, being dissatisfied with the determination as being erroneous in law, demanded a case for the opinion of the court; which was stated as follows:—

The local board of health of Wolverhampton (henceforth called "the board"), in the month of April, 1861, served the owners and occupiers of property in several streets in the district called the Blakenall estate or district with notices under the Public Health Act, 1848 (11 & 12 Vict. c. 63), and the Local Government Act, 1858 (21 & 22 Vict. c. 98), to sewer, level, pave, flag, channel, metal, and make good those streets to the satisfaction of the board. The respondent was the owner of property in three of those streets called *163] Bromney Street, Sedgley Street, and Duncan Street; *and he was served with three notices, which, with the exception of the names of the several streets in which the property was situate, were in the following words:—

“Borough of Wolverhampton.

“The Public Health Act, 1848, and The Local Government Act, 1858.

“The town-council, acting as the local board of health within and for the borough and corporate district of Wolverhampton, do hereby give you notice that the street called Duncan Street, situate within such corporate district, and not being a highway, is not sewered levelled, paved, flagged and channelled, metalled, and made good to the satisfaction of such local board of health: And the said local board of health do hereby give you further notice, and require you within one month from the service hereof, to sewer, level, pave, flag and channel, metal, and make good the said street to their satisfaction: and, in case you do not comply with the above notice, the said local board will execute the works above referred to, and charge and recover the expenses thereof as directed by the Public Health Act, 1848, and the Local Government Act, 1858. Dated the 8th day of April, 1861.

‘E. J. HAYES,

“Clerk to the said local board of health.

“To the respective owners or occupiers of the premises fronting, adjoining, or abutting upon the said street.”

At the foot thereof the following notice was printed in red ink:—

“Particulars of the necessary works may be obtained from the borough surveyor, Office, No. 3, Town Hall.”

Certain plans and specifications were accordingly lodged at the surveyor’s office, and were seen there by *the respondent and [*164 several of the other owners of property in the said streets. The respondent and other owners of property in the said streets did not execute the works by the said notices required, and the same were subsequently executed by the board; and the proportion of the respondent of the amount of the expenses incurred by them in so doing was settled by the surveyor of the board at 97*l.* 19*s.* 5*d.*, and notice of the amount of such proportion was given to the respondent on the 11th of March, 1862, and payment thereof then demanded from him.

On the 10th of May, 1862, the respondent and other owners of property presented a memorial to the mayor, complaining of the excessive sums demanded.

On the 16th of May, 1862, a notice to the board, signed by the respondent and other owners of property in the Blakenall district, was served upon the clerk to the board, which is as follows:—

“Wolverhampton, May 15th, 1862.

“To the local board of the borough and corporate district of Wolverhampton.

“We, the undersigned, beg respectfully to give you notice that we severally dispute the amounts of the proportion settled by your surveyor to be due from us in respect of works executed by you under the Public Health Act, 1848, or the Local Government Act, 1858, and for the repayment of which we are liable, on the ground that the cost of the said works is excessive and unfair: and we beg leave to call your attention to the memorial presented through the mayor to the town-council on Monday last, relating to this overcharge, and

hope you will reduce the price, and make it fair and reasonable; and, as the contractor has constructed the streets with improper material, we consider you may fairly call upon him to reduce the amount of contract."

*165] *On the 10th of June, 1862, another notice signed by the respondent and other owners of property in the said district, was served on the clerk of the board, of which the following is a copy:—

"Wolverhampton, 10th June, 1862.

"To the local board of the borough and corporate district of Wolverhampton.

"We, the undersigned, beg respectfully to give you notice that we severally dispute the amount of the proportion settled by your surveyor to be due from us in respect of works executed by you under the Public Health Act, 1848, or the Local Government Act, 1858, and for the repayment of which we are liable, on the ground that the cost of the said works is excessive and unfair: and we respectfully request you to concur with us in the appointment of a single arbitrator, pursuant to the said acts."

The following reply was sent:—

"Town Hall, Wolverhampton,
"14 June, 1862.

"Gentlemen,—I submitted your notice of the 10th instant to the finance-committee on the day it was received; and I was directed to apply to you for the payment of the respective amounts due from you in respect of the streets to which you refer.

"The subject of the apportionment belongs to the streets committee, and will be brought before them at their meeting on the 17th instant.

"I would suggest your referring me to your attorney, with whom I shall be happy to communicate. I think he will advise you that you have taken an erroneous view of the question to be submitted to arbitration, which is not as to the amount of the contract price being excessive, but confined to the proper apportionment of the amount
*166] expended or incurred *between the respective owners of property: and, if you will inspect the apportionment and plans in the borough surveyor's office, you will probably be satisfied as to the accuracy of the apportionment.

"E. J. HAYES, town-clerk."

On or about the 16th of June, 1862, the clerk to the board received a letter from Jeremiah Mason, with whom at that time and throughout the dispute which was the subject of the present proceeding the respondent was acting, which letter was as follows:—

"Dudley Road, Wolverhampton,
"June 16, 1862.

"Sir,—You were not in the office when Mr. Wilkinson called: he saw one of your clerks, and left word that he should be out next week: he is now away, and will be for seven or eight days; and in his absence we can only say we consider ourselves well advised, but should prefer having Mr. Wilkinson with us when the arbitrator is chosen."

On the 28th of June, 1862, the clerk to the board wrote and sent the following letter in reply:—

“Town Clerk’s Office, Wolverhampton,
“28th June, 1862.

“Gentlemen,—In reply to Mr. Mason’s letter of the 16th instant, I beg to inform you that several of the persons whose names are attached to your notice of the 10th instant have paid the amount of their respective apportionments; and others have informed the rates collector that they will pay, and are desirous of having their names withdrawn from the notice. Under these circumstances, I shall be glad to see Mr. Wilkinson or any other person on your behalf: but you must distinctly understand that the council do not recognise the power of an arbitrator to do more than ascertain *whether [*167 the expenses have been properly apportioned pursuant to the Public Health Act and the Local Government Act. It is quite clear that the arbitrator has no power to go into the question of the amount expended; his power being confined to settling the proportion payable by the respective owners, in case of dispute.

“As in all probability the steps you are taking will occasion considerable expense, and the question being a legal one, it would be more satisfactory to me, and I think more advantageous to yourselves, if you would consult an attorney, and put me in communication with him.

“E. J. HAYES, town-clerk.”

This correspondence did not lead to any result. No further step was then taken by the respondent and other owners, or by the board, for the appointment of an arbitrator: and, on the 4th of July, 1862, the former presented a memorial to the secretary of state for the home department pursuant to the Public Health Act, 1848, and the Local Government Act, 1858, in which, amongst other things, they complained of the course adopted by the board, and of having the arbitration powers limited to simply measuring the streets, without going into the proper value of them. In consequence of this memorial, Mr. Rawlinson, one of the government inspectors, on the 31st of July, 1862, held a meeting at Wolverhampton, which was attended by the board and by the respondent and other owners. Subsequently, a communication was forwarded by the home secretary to the board, recommending it to give time for payment of the sums demanded from the owners. On the 10th of August, 1862, the board wrote to the secretary of state to inquire whether the above communication was to be considered an “order” under the acts, and received a reply that *such communication “was merely recommendatory and [*168 suggestive of what was deemed to be a fair and equitable settlement in the case, and that no order could be issued in the matter.”

On or about the 5th of August, 1862, the respondent and others were summoned before the magistrates by the board under the 129th section of the Public Health Act, 1848, to recover the several amounts apportioned upon them by the surveyor of the board; and, on the 7th of August, the summonses came on for hearing, and were adjourned by arrangement between the parties to the 21st; on which day they came on for hearing, when the attorney for the respondent and other owners, before the merits were gone into, objected to the sufficiency of the notice to do the works, dated the 8th of April, 1861, on the authority of the case of *Parkinson v. The Mayor of Blackburn*, 33 Law Times 119; and the magistrates adjourned their decision on

this objection to a day which was ultimately extended to the 9th of October, 1862.

In the meantime, the board, being so advised, offered the respondent and others to withdraw the summonses, and to pay the costs: and, on the 8th of October, they served the respondent and others with a notice of arbitration, of which the following is a copy:—

“To Mr. Jeremiah Mason, Mr. Joseph Wilkinson, and others (named):

“The town-council, acting as the local board of health within and for the borough and corporate district of Wolverhampton, do hereby give you and each of you notice, that, as you have severally disputed the amount of the proportion settled by the surveyor of the said local board to be due from you in respect of works executed by the said local board under the Public Health Act, 1848, and the Local Government *Act, 1858, and for the repayment of which you are *169] liable; and you having severally requested the said local board to concur with you in the appointment of a single arbitrator, pursuant to the said acts; the said local board are ready and willing, and they hereby offer, to proceed to arbitration pursuant to the provisions of the statute in that behalf made and provided: And the said local board hereby give you further notice that they are ready and willing, and they hereby offer, to concur in the proposition for arbitration made by you to them, and in the appointment of a single arbitrator; and, in case you do not, within one week from the service upon you of this notice, concur with the said local board in the appointment of a single arbitrator, the said local board will appoint an arbitrator to act on their behalf in and about the premises. Dated this eighth day of October, 1862. E. J. HAYES,

“Clerk to the said local board of health.”

On the 9th of October, when the summonses again came on for hearing, the clerk to the board again offered to withdraw the summonses and to pay the costs, stating to the magistrates as a reason for taking such course that the board was then advised that the notice of the 10th of June, 1862, given by the respondent and others, had made arbitration the only proper mode of proceeding against the respondent and others. The magistrates refused to allow the summonses to be withdrawn; and, on the 11th of October, dismissed them all, with costs, on the preliminary objection taken to the notice of the 8th of April, 1861.

On the 14th of October, the attorney for the respondent and the other parties sent by post to the clerk to the board a letter as follows:—

*“Walsall, 14th October, 1862.

*170] “Dear Sir,—As attorney for Jeremiah Mason, Joseph Wilkinson, &c., I do hereby give you notice that they abandon their notice to the local board, dated the 10th of June last: And I further give you notice that the said persons do not dispute the *proportions* of expenses incurred by the local board under the Public Health Act, 1848, or the Local Government Act, 1858, as settled by the surveyor; but they dispute their legal liability to pay the same, or any part thereof. W. H. DUIGNAN.”

On the 18th of October, 1862, the respondent was served with a

notice and copy appointment of arbitrator, of which the following are respectively copies:—

“To Joseph Wilkinson, of the borough of Wolverhampton.

“Whereas the town-council, acting as the local board of health within and for the borough and corporate district of Wolverhampton, received a written notice from you, dated the 10th of June last, that you disputed the amount of the proportion settled by the surveyor of the said local board to be due from you in respect of works executed by the said local board under the Public Health Act, 1848, or the Local Government Act, 1858, and for the repayment of which you are liable, on the ground that the cost of the said works was excessive and unfair; and you thereby requested the said local board to concur with you in the appointment of a single arbitrator, pursuant to the said acts: And whereas the said local board, on the 8th of October instant, gave you notice that they were ready and willing to proceed to arbitration, and to concur with you in the appointment of a single arbitrator, and requested you to concur in such appointment within one week from the service of the *now-reciting notice: And [*171 whereas you have failed to appoint an arbitrator, or to concur in the appointment of a single arbitrator: Now, therefore, the said local board of health do hereby give you notice that they have appointed Rupert Kettle, Esq., county-court judge, as the arbitrator to whom the matter in dispute shall be referred: And the said local board request you to appoint an arbitrator on your behalf to whom the matter shall be referred: And the said local board also give you notice that the matter to be referred is the dispute mentioned or referred to in your notice hereinbefore recited, as to the proportion settled by the surveyor of the said local board to be due from you in respect of the works mentioned or referred to in the said notice, and to be paid by you, according to the frontage of your premises: And the said local board also give you notice, that, accompanying this notice is a copy of the appointment of the said Rupert Kettle as such arbitrator as aforesaid, and that if for the space of fourteen days after this notice is given to you you fail to appoint an arbitrator, the said Rupert Kettle will be deemed to be appointed by and will act on behalf of both parties. Dated the 18th of October, 1862.

“E. J. HAYES,

“Clerk to the said local board of health.”

“In the matter of an arbitration between the local board of health of the borough and corporate district of Wolverhampton, and Joseph Wilkinson, of the said borough:

“Whereas, the town council, acting as the local board of health within and for the borough and corporate district of Wolverhampton, received a written notice from the said Joseph Wilkinson, dated the 10th of June last, that he disputed the amount of the proportion settled by the surveyor of the said local board *to be due from [*172 him in respect of works executed by the said local board under the Public Health Act, 1848, or the Local Government Act, 1858, and for the repayment of which the said Joseph Wilkinson was liable, on the ground that the cost of the said works was excessive and unfair; and the said Joseph Wilkinson thereby requested the said local board to concur with him in the appointment of a

single arbitrator, pursuant to the said acts: And whereas the said local board, on the 8th of October instant, served the said Joseph Wilkinson with notice that they were ready and willing to proceed to arbitration, and to concur with him in the appointment of a single arbitrator, and requested him to concur in such appointment within one week from the service of the now-reciting notice: And whereas the said Joseph Wilkinson has failed to appoint an arbitrator, or to concur in the appointment of a single arbitrator: Now, therefore, the said local board of health do, by this writing under the common seal of the said borough and corporate district, appoint Rupert Kettle, of, &c., Esq., county-court judge, as the arbitrator to whom the matter in dispute shall be referred; which said matter is the dispute mentioned or referred to in the notice from the said Joseph Wilkinson here-inbefore recited, as to the proportion settled by the surveyor of the said local board to be due from him in respect of the works mentioned or referred to in the said notice, and to be paid by the said Joseph Wilkinson, according to the frontage of his premises.

"Given under the common seal of
the said borough and corporate dis- } Corporate
trict, the 17th day of October, 1862. } seal.

"E. J. HAYES,

"Clerk to the said local board of health."

*173] A correspondence then took place between the *attorney for Wilkinson, and the clerk to the board, of which the following is a copy:—

Duignan to Hayes, October 30, 1862:—

"Dear Sir,—Messrs. Mason, Wilkinson, &c., have brought me your notices of the 17th and 18th instant. I have already informed you that they abandoned their notice of the 10th of June, upon which the present proceedings assume to be founded: and you are well aware that the question you propose to refer never was in dispute between the parties and the local board. The original contention was, the proper cost of the works. That question the parties were most anxious to refer by their notice of the 10th of June. The question which you propose now to refer is simply the proportions as settled by the surveyor, which you know very well never have been in dispute: and, on behalf of the parties, I again give you notice that they are satisfied with those proportions, but dispute their legal liability to pay them, on grounds which the recent proceedings have disclosed to you. With these intimations, I must leave you to take any further proceedings you may think fit. I can only say that they are useless and unnecessary. You must excuse me for adding you are evidently seeking to do indirectly what you cannot do directly, and you are shirking the real question between the parties and the board."

• Hayes to Duignan, October 31, 1862:—

"The Local Board v. Smith and others.

"Dear Sir,—The course which the local board are adopting has been well considered, and is unanimously agreed to by their body. In the interests of the rate-payers generally, they feel that your clients have no right either moral or legal to evade payment of the

*174] amount claimed from them, and regret to find a number *of persons who make great professions of integrity of purpose

now seek by a mere technicality to shield themselves from payment altogether.

"In their notices of the 15th of May and 10th of June, your clients disputed the amount of the proportions settled by the surveyor, on the ground that the cost of the works is excessive and unfair; and they asked the local board to concur with them in the appointment of an arbitrator. This request the local board afterwards acquiesced in; and the arbitration now proposed will embrace everything in dispute; the council being anxious that the arbitrator shall exercise every power which the law gives him; and I cannot conceive that any body of men who simply wish to do what is right can require more.

"You are in error in stating that the proportions have never been in dispute. The deputation from the owners pointed out several instances of what they considered errors in the apportionment. Those alleged errors, the proper cost of the works, and every question which the arbitrator can go into, will be referred; and, if your clients were sincere in their frequently expressed desire to pay the proper cost of the works, they should not now shrink from an investigation before a tribunal named by themselves."

Duignan to Hayes, November 3d, 1862:—

"The Local Board v. Smith and others.

"Dear Sir,—It is very well for you to say the arbitrator shall exercise every power which the law gives him, because you know very well that his powers are limited to the proportions, and that he cannot go into cost. * * * Again I say, there is no need for arbitration. We admit the proportions as settled by the surveyor, but deny our liability to pay them. Why not try the question of liability fairly and openly?"

*Hayes to Duignan, November 7th, 1862:—

[*175

"The Local Board v. Smith and others.

"Dear Sir,—It is for the arbitrator to determine what his powers are. The 69th section of the Public Health Act, 1848, provides that 'the proportion shall be settled by the surveyor, or, in case of dispute, by arbitration (having regard to all the circumstances of the case).' Your clients asked for arbitration, and you now complain because their request was complied with. They made grave imputations against the surveyor and contractor: they complained of the mode of executing the works, and of the materials used; they also complained that an implied promise of time for payment had been given to them by the streets committee, and that their reason for not making the streets themselves was their being misled by the statements of the surveyor. These complaints were made to the committees of the council on several occasions, and were embodied in a circular addressed by your clients to each member of the council, and also a memorial to the secretary of state; and, now that the council offer an opportunity for a thorough investigation, you say there is no need for arbitration. If too much has been charged, or the mistakes which your clients referred to as to the apportionment have occurred, or time for payment was really promised, no one could blame your clients for requiring arbitration: but, if they decline an investigation which they have all along sought to have, and saddle upon the rate-

payers generally a liability which belongs to themselves alone, they leave the council no alternative but to proceed with the arbitration, and try the question of liability fairly and openly."

On the 29th of November, 1862, the respondent was duly served with notice to attend the arbitration in the town-hall of Wolverhampton on the 6th of *December: on which day the arbi-
*176] trator sat; and the attorney for the respondent and other parties attended before him, and contended he had no jurisdiction to proceed with the arbitration: and he handed in to the arbitrator a written protest signed by him on behalf of the respondent and other owners, of which the following is a copy:—

"Rupert Kettle, Esq.

"Sir,—Referring to your notices of the 28th ultimo, purporting to be in the matter of arbitrations between us the undersigned and the local board of health of the borough of Wolverhampton, we beg respectfully to inform you that we protest against any proceedings in the said alleged arbitration,—First, because there is no dispute between us and the said local board which an arbitrator has power to decide—Secondly, because we do not dispute the proportions of expenses incurred by the local board in the execution of the works executed by them, as settled by the surveyor, but are satisfied therewith, whereof the said local board had notice before proceeding in the matter of the said arbitrations,—Thirdly, because we dispute our liability to the said local board, on the ground of the excessive and unreasonable cost of the works executed by them, and also on the ground that the said local board did not previous to the execution of the said works give us the notice required by the 69th section of the Public Health Act, 1848; into which disputes we are advised you have not by law jurisdiction to inquire,—Fourthly, because the said local board proceeded against us to recover our respective proportions of the works executed by them in a summary way before justices, and such proceedings were on the 9th of October last adjudicated upon by the justices, and dismissed with costs. For these and other reasons which we think it at present unnecessary to mention, we
*177] respectfully submit *that you ought not to proceed in the said arbitrations, and that any proceedings thereon are wanton and unnecessary, and will be void and of no effect."

In reply, it was contended on behalf of the board that the arbitrator had the power, and that it was his duty, to decide the real question between the parties; and that it would be idle to go to arbitration merely on the question of the correctness of the apportionment of the charges as settled by the surveyor, without taking into consideration the fairness and reasonableness of those charges. But the attorney of the respondent refused to go into the arbitration, and left the town-hall; and thereupon the arbitrator proceeded with the reference ex parte, and heard the evidence adduced on behalf of the board.

On the 31st of December, to which day he had duly enlarged the time for the purpose, the arbitrator made and published his award, of which the following is a copy:—

"In the matter of an arbitration between the Local Board of Health of the borough and corporate district of Wolverhampton and

Joseph Wilkinson: Whereas the town-council, acting as the local board of health within and for the borough and corporate district of Wolverhampton, on the 17th of October last by writing under the common seal of the said borough and corporate district,—after reciting that the said local board of health had received a written notice from the said Joseph Wilkinson, dated the 10th of June then last, that he disputed the amount of the proportion settled by the surveyor of the said local board to be due from him in respect of works executed by the said local board under the Public Health Act, 1848, or the Local Government Act, 1858, and for the repayment of which the said Joseph Wilkinson was liable, on the ground that the cost of the said works was excessive and *unfair; and the said Joseph [*178 Wilkinson thereby requested the said local board to concur with him in the appointment of a single arbitrator, pursuant to the said acts; and reciting that the said local board, on the 8th of October then instant, served the said Joseph Wilkinson with notice that they were ready and willing to proceed to arbitration, and to concur with him in the appointment of a single arbitrator, and requesting him to concur in such appointment within one week from the service of the notice now in recital, did appoint me, the undersigned, Rupert Kettle, as arbitrator, to whom the matter in dispute should be referred, which said matter was the dispute mentioned or referred to in the notice from the said Joseph Wilkinson thereinbefore recited, as to the proportion settled by the surveyor of the said local board to be due from him in respect of the works mentioned or referred to in the said notice, and to be paid by the said Joseph Wilkinson, according to the frontage of his premises: And whereas, before I, the arbitrator so appointed as aforesaid, entered upon the said reference, that is to say, on the 6th of November last, I did make and subscribe before William Warner, Esq., a justice of the peace for the borough of Wolverhampton aforesaid, the declaration hereunto annexed: And whereas I, the said arbitrator, did on the 6th of November last, after making and subscribing the aforesaid declaration, by endorsement on the before-recited appointment, extend the time for making my award until, and did duly appoint for that purpose this 31st of December, 1862: Now I, the said arbitrator, having made and subscribed the said annexed declaration, and having taken upon myself the burthen of this reference, and having duly weighed the evidence of witnesses examined before me on oath, and having examined the minute-books, notices, estimates, plans, tenders, contracts, accounts, and documents produced and proved before me, do make and publish this my *award in writing of and concerning the matters so as afore- [*179 said referred to me, as follows, that is to say,—I award and adjudge that the proportion due and payable by the said Joseph Wilkinson to the said local board for the works executed by the said board under the Public Health Act, 1848, or the Local Government Act, 1858, is the sum of 92*l.* 7*s.* 6*d.*: And I further award and adjudge that the costs of the said local board of and consequent upon this reference shall be paid by the said Joseph Wilkinson to the said local board, and that the said Joseph Wilkinson shall bear and pay his own costs."

The amount apportioned by the surveyor against the respondent

and claimed by the board was 97*l.* 19*s.* 5*d.*: but the arbitrator reduced the amount to 92*l.* 7*s.* 6*d.* The appointment of the arbitrator was (on the application of the board) in Hilary Term, 1863, made a rule of this court; and the costs of the board of and consequent upon the reference, and of making the appointment a rule of court, were taxed by the proper officer at the sum of 23*l.* 3*s.* 10*d.*

On the 14th of April, 1863, payment of the said sums of 92*l.* 7*s.* 6*d.*, and 23*l.* 3*s.* 10*d.* for costs, was duly demanded of the respondent, and he refused to pay the same.

On the 21st of April, 1863, the board applied for and obtained a rule of this court calling upon the respondent to show cause why he should not pay to the board the sum awarded by the arbitrator, and the costs; and such rule was argued on the 3d of June last and the same was discharged.

Upon the facts and documents before the magistrate, it was contended on the part of the respondent,—first, that the original notice of the 8th of April, 1861, given by the board to the respondent, was bad; and, a good notice being a condition precedent to his liability *180] for the *expenses, there never was any liability,—secondly, that the award was a nullity, for two reasons, 1, that the respondent did not at the time the arbitrator was appointed dispute the correctness of the apportionment, 2, that the notices of arbitration given by the respondent and the other property owners on the 15th of May and 10th of June, 1862, were revoked by the letter of the 14th of October, 1862, and the subsequent correspondence.

On the other hand, it was contended for the appellant,—first, that the notice of the 8th of April, 1861, was valid, and that any objection to its validity had been waived by the subsequent notice of arbitration given by the respondent,—secondly, that the award was good and conclusive, and that the notice of arbitration given by the respondent had not been legally revoked, because he from first to last disputed the amount which he was called on to pay, on the ground that the charge for the work was unfair and unreasonable; and that the alleged notice of abandonment could not legally be given, and that the same was not given with a bonâ fide intention of abandoning the ground of dispute; and that, so long as such dispute existed, it could only be determined by arbitration.

The magistrate found as facts, on the evidence before him, that, up to the 31st of July, 1862, the respondent disputed his liability to pay the amount of the proportion settled by the surveyor, on the ground that the costs were excessive and unfair; that, on the 10th of June, 1862, the respondent gave notice to the board that he required the matters to be settled by arbitration; that, on the 5th of August, 1862, the respondent took the objection before the magistrates to the validity of the notice to execute the works, dated the 8th of April, 1861, which was decided in his favour on the 11th of October, 1862; that, on the *181] 8th of October, the respondent *was served by the board with notice of arbitration; and that, on the 14th of October, the respondent gave notice to the board that he abandoned his notice of arbitration of the 10th of June, 1862, and also gave notice to the board that he did not dispute the proportions of expenses incurred, but did dispute his legal liability to pay the same or any part thereof. The

magistrate found also, that, up to the hearing before the arbitrator, and by his protest delivered to the arbitrator, the respondent disputed his liability to pay the amount, on the ground of the excessive and unreasonable cost of the works.

The magistrate was also of opinion that the notice of the 8th of April, 1861, was good; but he dismissed the summons, in consequence of the doubts he had whether under the facts and circumstances stated in this case, and looking at the judgment of the Court of Common Pleas, the award was good.

The following questions were submitted for the opinion of the court:—

1. Whether the notice of the 8th day of April, 1861, was a good notice.

2. Whether the award was valid, and whether, looking at the 123d section of the 11 & 12 Vict. c. 63, the arbitrator had any jurisdiction to inquire into its validity.

Hayes, Serjt. (with whom was *M Mahon*), for the appellant.(a)—The question raised by this appeal turns *mainly upon the construction of the 69th and 123d sections of the Public Health [*182 Act, 1848, 11 & 12 Vict. c. 63. The 69th section of that act enacts, that, “in case any present or future street, or any part thereof (not being a highway), be not sewered, levelled, paved, flagged, and channelled to the satisfaction of the local board of health, such board may, by notice in writing to the respective owners or occupiers of the premises fronting, adjoining, or abutting upon such parts thereof as may require to be sewered, levelled, paved, flagged, or channelled, require them to sewer, level, pave, flag, or channel the same within a time to be specified in such notice; and, if such notice be not complied with, the said local board may, if they shall think fit, execute the works mentioned or referred to therein; and the expenses incurred by them in so doing shall be paid by the owners in default, according to the frontage of their respective premises, and in such proportion as shall be settled by the surveyor, or, in case of dispute, as shall be settled by arbitration (having regard to all the circumstances of the case) in the manner provided by this act; and such expenses may be recovered from the last-mentioned owners in a summary manner, or the same may be declared by order of the said local board to be private improvement expenses, and be recoverable as such in the manner hereinafter [s. 90] provided.” And s. 123 enacts, that, in case of dispute as to the amount of any compensation to be made under the provisions of this act (except where the mode of determining the same is specially provided for), and in case of any matter which by this act is authorized or directed to be settled by arbitration, then, unless both parties concur in the *appointment of a single [*183 arbitrator, each party, on the request of the other, shall appoint an arbitrator, to whom the matter shall be referred; and every such

(a) The following were the points marked for argument on the part of the appellant:—

“1. That the notice of the 8th of April, 1861, was valid; and that, if not, any objection to its validity was waived by the respondent’s subsequent conduct:

“2. That the award was good, inasmuch as the respondent disputed his liability to pay the amount up to the hearing before the arbitrator, and such dispute could not be settled otherwise than by arbitration, and therefore he could not revoke his assent to arbitration, or refuse to go to arbitration; and he in fact did not revoke such assent:

“3. That the award, being valid, was therefore conclusive to all intents.”

appointment when made on the behalf of the local board of health shall (in the case of a non-corporate district) be under their seal and the hands of any five or more of their number, or under the common seal in the case of a corporate district, and, on the behalf of any other party, under his hand, or, if such party be a corporation aggregate, under the common seal thereof; and such appointment shall be delivered to the arbitrators, and shall be deemed a submission to arbitration by the parties making the same; and, after the making of any such appointment, the same shall not be revoked without the consent of both parties, nor shall the death of either party operate a revocation; and if for the space of fourteen days after such matter shall have arisen, and notice in writing by one party who has himself duly appointed an arbitrator to the other party, stating the matter to be referred, and accompanied by a copy of such appointment, the party to whom notice is given fail to appoint an arbitrator, the arbitrator appointed by the party giving the notice shall be deemed to be appointed by and shall act on behalf of both parties: and the award of any arbitrator or arbitrators appointed in pursuance of this act shall be binding, final, and conclusive upon all persons, and to all intents and purposes whatsoever." The notice, it is submitted, is sufficiently explicit; and, if it were otherwise, the respondent has by his subsequent conduct waived all objection to it. The act of parliament requires the work to be done under the superintendence of the surveyor to the local board; and the notice itself refers to a plan which was open to the inspection of all parties at the office. The *184] only mode of adjusting disputes is by arbitration. *Having once assented to a reference, it was not competent to the parties afterwards to withdraw from it; and the award is perfectly valid, although this court on a former occasion held that they could not enforce it by an order under the 1 & 2 Vict. c. 110, s. 18.(a)

Gray, Q. C. (with whom was *Macnamara*), contra.—The only matter as to which the statute contemplates an arbitration, is, the apportionment of the expense of the works amongst the proprietors themselves, not as to the amount of the expenditure incurred in their performance. As between the proprietors and the local board, the only course to be pursued in the event of a disagreement, is, by appeal to the general board, under the 120th section of the 11 & 12 Vict. c. 63. [BYLES, J.—Does the statute give any greater power to the arbitrator than the surveyor had?] It is submitted that it does not. The 63d section of the Local Government Act, 21 & 22 Vict. c. 98, enacts that "notwithstanding anything in the Public Health Act contained, in all cases where by such act the local board shall have incurred expenses for the repayment whereof the owners of the premises for or in respect of which the same are incurred is made liable by the Public Health Act, 1848, or any act incorporated therewith, or by this act, and such expenses have been settled and apportioned by the surveyor as payable by such owner, such apportionment shall be binding and conclusive upon such owner, unless, within the expiration of three months from the time of notice being given by the local board or their surveyor of the amount of the proportion so settled by the said surveyor to be due from such owner, he shall by

(a) In re The Wolverhampton Local Board of Health and Hodges, Trinity Term, 1863. Not reported.

written notice dispute the same." [ERLE, C. J.—The 64th section(a) *looks as if the magistrates were, in case the matter in dispute is less than 20*l.* to go into the question of amount.] [*185] The notice upon which the arbitration is founded having been withdrawn, the whole subsequent proceeding falls. The party has a locus *pœnitentiæ* down to the time of the arbitrator's appointment, and before that time the notice to dispute the amount had been withdrawn. There was therefore no ground for a submission to arbitration; and consequently the whole proceeding was without jurisdiction, and void. A valid notice is a condition precedent: *The Mayor, &c., of Salford v. Ackers*, 16 M. & W. 85. This notice clearly is not sufficient. It does not give the parties who are called upon to do the work any information as to what they are required to do, or how it is to be done. In *Parkinson v. The Mayor, &c., of Blackburn*, 33 Law Times 119, a notice requiring the owner of premises in a street not a highway "to repair, form, and pave the said street to the extent of his premises adjoining such street," and intimating to him, that, in case he should neglect so to repair, form, and pave for the space of one calendar month after service thereof, the corporation would themselves cause the work to be done, and hold him liable for the expenses they might incur in respect thereof, was held bad for not sufficiently specifying the works required to be done. "The act," says Lord Campbell, "says *that the corporation shall cause notice in writing [*186] to be given to the respective owners, requiring them to sewer, level, pave, flag, or channel the street. The works are to be specified, and each owner is then to set to work to do what is required to be done. Then, the notice should state what is to be done. But this notice says that the street is to be repaired, formed, and paved. It runs away from the terms of the act, and is in my opinion insufficient." The other learned judges concur in holding that the notice should fairly show the parties on whom it is served what they are required to do. The 16th section of the Local Government Act (1858) Amendment Act, 1861 (24 & 25 Vict. c. 61), plainly shows the intention of the legislature. It enacts, that, "before giving the notice mentioned in the 69th section of the Public Health Act, 1848, the local board shall cause plans and sections of the works intended to be executed under that section and the 38th section of the Local Government Act, 1858, to be made, under the direction of their surveyor, on a scale of not less than one inch for 88 feet for a horizontal plan, and on a scale of not less than one inch for 10 feet for a vertical section, and, in the case of a sewer, showing the depth of such sewer below the surface of the ground: and such plans and sections shall be deposited in the office of the local board, and shall be open at all reasonable hours for the inspection of all persons interested therein during the period for which such notice is required to be given; and a reference to such plans and sections in such notice shall be held sufficient, without requiring any copy of such plans and sections to

(a) Which enacts that "all questions referable to arbitration under the Public Health Act, 1848, or this act, or any act incorporated therewith, may, when the amount in dispute is less than 20*l.*, be determined before two justices in a summary manner; but the justices may, if they think fit, require that the work in respect of which the claim of the local board is made, and the particulars of the claim, be reported on to them by any competent surveyor, not being the surveyor of the local board," &c.

be annexed to such notice." And s. 17 provides a form of notice to be used, which is to describe the mode to be adopted and the material to be used, and other minute particulars. [BYLES, J.—The new *187] statute makes that obligatory which was *reasonable and expedient before.] It shows at all events that this notice was not sufficiently precise.

Hayes, Serjt., in reply, was desired by the court to confine himself to the question as to the jurisdiction of the arbitrator.—He submitted, that, if the duty of the arbitrator was limited to the inquiry as to the propriety of the apportionment, it was in effect referring to him a mere arithmetical calculation.

ERLE, C. J.—I am of opinion that our judgment in this case should be for the respondent. This is a proceeding under the 69th section of the Public Health Act, 1848, 11 & 12 Vict. c. 63. By that section power is given to the local board, in case any street (not being a highway) be not sewered, levelled, paved, flagged, and channelled to their satisfaction, by notice in writing to the respective owners or occupiers of the premises fronting, adjoining, or abutting upon such parts thereof as may require to be sewered, &c., to require them to sewer, level, pave, flag, or channel the same within a time to be specified in such notice; and, if such notice be not complied with, the local board may if they think fit execute the works mentioned or referred to therein; and the expenses incurred by them in so doing are to be paid by the owners in default according to the frontage of their respective premises, and in such proportion as shall be settled by the surveyor, or, in case of dispute, as shall be settled by arbitration in the manner provided by the act. The first question argued before us has been, whether the notice given by the local board to the owners or occupiers under that section was a sufficient notice: and the objection urged was, that it did not specify the breadth, level, or any other particulars, so as to enable the parties to whom it was addressed *188] to know *what they were called upon to do. In *Parkinson v. The Mayor, &c., of Blackburn*, 33 Law Times 119, a notice requiring the owner "to repair, form, and pave the said street to the extent of his premises adjoining such street," was held to be bad for not sufficiently specifying the works which the party was required to do. But I think there is a material distinction between that case and the present. There, no means were pointed out to the party whereby he could ascertain what work was required to be done: whereas here, intimation was given by a note at the foot of the notice, that "particulars of the necessary works might be obtained from the borough surveyor," at the office of the local board, in the town-hall. I see nothing to show that the notice, with that additional information, is not sufficient. So far, therefore, I agree with the judgment pronounced by the magistrate before whom the proceeding was had. That proceeding was had for the purpose of enforcing the award. The magistrate was further of opinion that the award was not valid: and I am of opinion that the conclusion he came to was right. The 69th section of the Public Health Act, 1848, authorizes the arbitrator to deal only with the apportionment. If the works are not done by the owners or occupiers pursuant to the notice, the local board may cause them to be done, and the expenses,—of the amount of which the local

board are to be the sole judges, subject to appeal to the general board, under s. 120,—incurred in so doing are to be paid by the owners in default, according to the frontage of their respective premises, and in such proportion as shall be settled by the surveyor, or, in case of dispute, by arbitration. If the parties are dissatisfied with the apportionment of the surveyor, in respect of that they have a right to demand an arbitration. The words of the statute clearly appear to me to bear that meaning and *no other. I take the word apportionment to be a word of a recognised meaning in the law,—as [*189 under the Tithe Commutation Act, 6 & 7 W. 4, c. 71. I also look to the provision in the Local Government Act, 1858, 21 & 22 Vict. c. 98, s. 64, which speaks of proceedings before justices where the amount in dispute is less than 20*l.*, whereby the justices are at liberty to require a report of a competent surveyor. At the first reading, that appeared to me to authorize an inquiry as to whether the expenses had been properly incurred by the local board: but, upon further looking at it, I am of opinion that it only applies to the arbitration given by the former statute, and is to be confined within the same limits. And, though it may be said to be unreasonable that a board should have power to incur expense, and that those upon whom the burthen of paying it is to fall should have no means of investigating the propriety of the outlay, yet the same inconvenience occurs in many instances of self-government of districts, where individuals are selected to perform public duties involving the expenditure of large sums of money which are to be provided for by a rate levied upon the district. The remedy is by removing them if their trust is neglected or abused. They have not, therefore, an absolutely irresponsible power. Besides, the expenditure of such bodies is always controlled by auditors. Upon the whole, the best opinion I can form, is, that the outlay actually made is to be settled finally by the local board, and to be apportioned amongst the several owners or occupiers by the surveyor, or, in case of dispute, by an arbitrator, whose jurisdiction is confined to the question of apportionment, and who has no authority to inquire into the reasonableness of the amount which has been expended upon the works. Then, if that be so, I am of opinion that the award is bad for two reasons. In the first place, the arbitrator *has [*190 gone into the question whether or not the expenses were properly incurred by the local board. This he had no right to do. He has, however, gone into the matter, and has taken off 5*l.* 11*s.* 11*d.* If this had been the only objection to his award, I do not think I should have been inclined to yield to it. But there is this further objection. On the 10th of June, 1862, the respondent and the other parties charged gave notice to the local board that they required an arbitration. That might have been for the purpose of questioning the apportionment, though they go on to say that they dispute it “on the ground that the cost of the said works is excessive and unfair.” The legal adviser of the board, in a letter of the 14th of June, intimates to the parties that they have taken an erroneous view of the question to be submitted to arbitration, which, he informs them, is not as to the amount of the contract price being excessive, but “confined to the proper apportionment of the amount expended or incurred between the respective owners of property.” The local

board, treating the above notice as a nullity, on the 5th of August took out summonses against the several parties, which summonses came on for hearing on the 21st, when the sufficiency of the notice of the 8th of April, 1861, being objected to on the part of the defendants, on the authority of the case before referred to of *Parkinson v. The Mayor, &c., of Blackburn*, the magistrates adjourned their decision. Before any decision was pronounced, the local board proposed to withdraw the summonses; and on the 8th of October they served the several parties with a notice that they were ready to concur in the proposition for arbitration made by the former, and that, in case they did not within a week concur with the local board in the appointment of a single arbitrator, the board would appoint an arbitrator to *191] act on their behalf. On the 11th of *October, the magistrates, declining to permit the summonses to be withdrawn, dismissed them with costs, on the preliminary objection taken to the notice of the 8th of April, 1861. On the 14th of October, the attorney for the parties gave notice to the board that they abandoned their notice of the 10th of June, 1862. This, I think, they had a right to do. They did not dispute the *proportions*; and they could not demand an arbitration on the total amount expended. On the 18th of October, the defendants were served with a notice and copy of the appointment of Mr. Rupert Kettle as arbitrator,—the board insisting upon their right to treat the dispute as still subsisting, and to go on with the arbitration. I am of opinion that the award made under these circumstances was a void award. That was the opinion of the magistrate; and his decision must be affirmed.

WILLES, J.—With respect to the question whether the original notice (of the 8th of April, 1861) was valid or not, I entirely concur with the Lord Chief Justice: and, assuming the proper construction to be put upon the words “expenses incurred” in the 69th section of the Public Health Act, 1848, is that which my Lord has put upon them, I concur in all the rest of his judgment; because, if “expenses incurred” means an amount to be fixed by the local board or their surveyor, and the proceedings before the arbitrator are to relate to the question of apportionment only, it is clear that there was no ground for the appointment of an arbitrator on the 18th of October, 1862, and, unless that was a valid appointment, all the subsequent proceedings were void. If the true construction of the 69th section be that put upon it by my Lord, it could only be valid as an appointment of an arbitrator in respect of the apportionment: and at that time the *192] local *board had received notice that the owners disputed only the total expenses incurred, and that all dispute as to the apportionment was abandoned. If the total amount was to be considered as finally ascertained, it is clear that the notice of the 14th of October, 1862, put an end to all dispute, and withdrew any arbitration which could have been had under the first notice.

The only question which remains, is, whether the arbitrator would have a right to determine not only what was the amount which each owner was to pay in respect of frontage, or was empowered to enter into the question whether the “expenses incurred,” that is, the total amount, were properly and reasonably incurred. Upon that I have entertained, and I cannot say that I do not still entertain, some doubt,

because I think the words "expenses incurred" would in their ordinary construction mean *reasonably* incurred. Wherever a discretion is given to any official person or public body, it is to be exercised, not according to caprice, but in a reasonable manner. If the 69th section had stood alone, I should have been inclined so to construe it. But I do not dissent from the opinion expressed by the rest of the court, because I conceive that great light is thrown upon the meaning of s. 69 by some sections both prior and subsequent, to which I will shortly refer, and which show that "expenses incurred" may not unreasonably be held to mean such as in their discretion the local board may consider enough, or such as they may properly contract to pay. The words "expenses incurred" will be found in many parts of the act, and, except in one instance, is invariably used where the local board is empowered to execute works which a party upon whom the obligation to execute them has failed in so doing. Where the expenses are undergone in doing works which the local board themselves are to perform, the word "necessary" is introduced. A *consideration of these several sections may not be out of place here. [*193

Thus, in s. 49, where the owner or occupier of a house has been called upon to make proper drains, and has failed to do so, the board may do the works, and the *expenses incurred* by them in so doing are made recoverable by summary process. So, under s. 51, where the board, on the default of the owner to provide a proper water-closet, causes it to be done, the *expenses incurred* by them in so doing are likewise made recoverable by summary process. The same language is found in s. 54. By s. 57, the local board are empowered to provide and maintain convenient public water-closets, and to defray "the *necessary expenses*" out of the district rates to be levied under the act. Here we have a change in the phraseology. Passing on to s. 69, the "expenses incurred" by the local board in sewerage, levelling, &c., streets, which the adjoining owners have neglected to do, are to be paid by the owners, and "such expenses" may be recovered in a summary manner. Another change of expression is to be found in s. 71, which enacts, that, if and when, for the purposes of this act, the local board deem it necessary to raise, sink, or otherwise alter the situation of any water or gas-pipes, mains, plugs, or other water works or gas-works laid in or under any street, they may by notice in writing require the person to whom the pipes, mains, plugs, or works belong, to raise, sink, or otherwise alter the situation of the same, in such manner and within such reasonable time as shall be specified in such notice; and *the expenses attendant upon or connected with any such alteration* shall be paid by the said local board out of the general rates levied under the act." The expression, therefore, is different where the board are to pay for work done by others from what it is where the expenses are incurred by them in work done by themselves. Again, *the expression occurs in s. 72 (which is repealed by the [*194 21 & 22 Vict. c. 98, s. 84), which provided for "expenses incurred" by the local board in altering streets, &c., laid out otherwise than in accordance with the level and width approved by them; and again in s. 76, as to the supply of water. Again, in s. 90, which relates to private improvement rates, the expression used is, expenses which the local board have incurred or become liable to. The only

other section to which I will refer is the 85th, which relates to contracts made by the local board, and which contains a proviso, that, "before contracting for the execution of any works under the provisions of this act, the said local board shall obtain from the surveyor an estimate in writing, as well of the probable expense of executing the work in a substantial manner, as of the annual expense of repairing the same, also a report as to the most advantageous mode of contracting, that is to say, whether by contracting only for the execution of the work, or for executing and also maintaining the same in repair during a term of years or otherwise: provided also, that, before any contract of the value or amount of 100*l.* or upwards is entered into by the said local board, ten days' public notice at the least shall be given, expressing the nature and purpose thereof, and inviting tenders for the execution of the same. These very special provisions are introduced for the purpose of preventing any abuse of their powers by the board in the making of contracts, by giving preferences to friends, or securing any gain to themselves. They are prohibited from incurring any considerable expense without going through a process such as to insure notoriety and invite an expression of public opinion upon their acts. For these reasons, although I must own I entertain some doubt, I do not dissent from the opinion of my Lord and my two learned Brothers.

*195] *BYLES, J.—I entirely concur in the opinion expressed by my Lord. As to the notice of the 8th of April, 1861, the main objection is that the plans and specifications are not sent to each of the owners or occupiers. It seems to me to be much more reasonable that one general plan and specification should be deposited in a public place where it will be accessible at all reasonable times. The recent enactment, 24 & 25 Vict. c. 61, s. 16, shows that the more sensible construction of the former statute will be to hold this notice to be good. As to the principal question, whether the jurisdiction of the arbitrator extends to an inquiry into the reasonableness of the expenses incurred by the local board in the performance of the works, I must confess I do not participate in the doubts which have been expressed by my Brother Willes. All the things which the local board are to do are things which they might reasonably be expected to do. The 69th section of the Public Health Act, 1848, provides, that, if any future street (not being a highway) be not sewered, &c., to the satisfaction of the local board, the owners of the adjoining land shall be subject to receive a notice. It is their duty to do the work specified within the time limited by that notice. They need not fear partiality or unreasonableness of outlay: they may do the work themselves. If they do not comply with the notice, the local board may execute the works and charge them with the expenses incurred. There is no limit placed to the power of the local board in raising and expending the money. I agree that they are to incur a reasonable expense. But, who is to judge of the reasonableness, if not the local board? Is it to be the arbitrator, or the surveyor (who is the servant of the board)? The words must be read in their plain and natural sense. "The expenses incurred by the board in so
*196] doing shall be paid by the owners in default, *according to the frontage of their respective premises, and in such proportion

as shall be settled by the surveyor, or, in case of dispute, as shall be settled by arbitration (having regard to all the circumstances of the case) in the manner provided by this act." It is not, as my Brother Hayes suggested, a mere arithmetical calculation. The arbitrator clearly had no jurisdiction except as to the proportions. In going into the question of the general amount, he was acting without jurisdiction; and the excess of jurisdiction appears upon the face of his award. It purports to be made *de præmissis*: and it is bad. In addition to this, the arbitration was revoked in terms by the notice abandoning the dispute as to the only matter which the arbitrator could entertain. However much I regret being obliged to come to this conclusion, I am clearly of opinion that the magistrate's decision was right, and consequently that the respondent is entitled to judgment.

KEATING, J.—I also am of opinion that the magistrate was right upon both points. The notice of the 8th of April, 1861, was good for the reasons already given. I also agree that the award is bad. The notice not having been complied with, the local board were at liberty to execute the works themselves; and s. 69 provides that the expenses incurred by them in so doing shall be paid by the owners in default, according to the frontage of their respective premises, and "in such proportion as shall be settled by the surveyor, or, in case of dispute, as shall be settled by arbitration (having regard to all the circumstances of the case) in the manner provided by this act," to be recovered in a summary manner. The "expenses incurred," in my opinion, means, expenses actually incurred, not expenses which in the opinion of an arbitrator have been *reasonably incurred. [*197 When the object of the legislature is considered, this obviously must be so. The work is to be done. The option of doing it themselves is given to the adjoining proprietors. They refusing or neglecting to do it, the local board may do it. If their expenditure was to be subject to review, probably the work would not be done; for, the board would not care to encounter the conflict of evidence which would be sure to arise before the arbitrator. I think, therefore, there is nothing strained in the construction which would make the local board the sole judges of the proper expenditure. The legislature do not assume that the board will act otherwise than rightly: and, if the rate-payers are dissatisfied with the manner in which their duties are performed, they have the remedy in their own hands. The reasonableness of the expenditure must be decided by somebody: and it is certainly much more reasonable that it should be determined by the board than by an arbitrator. That being so, it follows that the only matter over which the arbitrator could have any jurisdiction, is, the proportion to be paid by each owner. That is the limit of his jurisdiction: and it appears from the statements in the case, as well as upon the face of the award itself, that he has exceeded that jurisdiction. For these reasons, I agree with the rest of the court in thinking that the magistrate was right in his decision.

Decision affirmed, without costs.(a)

(a) At the close of the case, Willes, J., observed upon the omission to number the paragraphs in the special case, and called attention to the provision in the rule of court of Hilary Term, 1862, 11 C. B. N. S. 477 (E. C. L. R. vol. 103), which prohibits the Master from allowing any costs of copying a case which does not comply with that rule, without a special order of the court or a judge.

***198] JOSEPH HODGSON, Appellant; ROBERT LITTLE, Respondent.**

It is no answer to a complaint against the occupier of a "fishing mill-dam," under the Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), for not lifting or removing the hatches or sliding-doors of his fishery during the close season, that the doing so would to some degree injuriously affect, but not ruinously, his milling power.

Amendment of a case stated under the 20 & 21 Vict c. 43.

THE following case was stated for the opinion of the court, pursuant to the 20 & 21 Vict. c. 43:—

At a petty session holden at Darlington, in the county of Durham, on the 23d of February, 1863, before three of Her Majesty's justices of the peace acting in and for the said county, an information preferred by Robert Little (hereinafter called "the respondent") against Joseph Hodgson (hereinafter called "the appellant"), under s. 20 of the Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), charging for that, on the 7th of October last, at the township of Dinsdale, in the said county of Durham, he the said appellant, then being the occupier of a certain fishery for salmon in the river Tees, did not within thirty-six hours after the commencement of the close season as fixed by the Salmon Fishery Act, 1861, cause to be removed and carried away from the waters within his fishery, the inscales, hecks, tops, and rails of all cruives, boxes, or cribs, and all planks and temporary fixtures used for taking or killing salmon, and all other obstructions to the free passage of fish in or through the cruives, cribs, and boxes within his fishery, and in such default for the space of, to wit, nine days, did continue, contrary to the form of the statute in such case made and provided,—was heard and determined by the justices, the said parties respectively then being present: and upon such hearing the appellant was convicted before the justices of the said offence; and they adjudged him to pay for every day, to wit, nine days, during which he had suffered certain obstructions to the free passage of fish, to wit,
*199] the lock-sluices, gates, or doors that were *not removed and carried away in compliance with the said section, to remain unremoved beyond the period prescribed by the said act, the sum of 2*l.*, and also to pay to the respondent the sum of 4*l.* 14*s.* for his costs in that behalf.

Upon the hearing of the said information, it was proved, that, during the times hereinafter mentioned, the appellant was a corn-miller, occupying as tenant and for the purposes of his business a corn-mill close by the fish-locks hereinafter mentioned, and was also the occupier or tenant of such fish-locks; and that the fishing mill-dam and locks hereinafter mentioned were used for the double purposes of fishing and of supplying water for the purposes of the said mill.

It was also proved that the appellant was the occupier of the corn-mill and fishery at a rental of 120*l.* a year for seven years from May, 1860; that the Dinsdale fishing mill-dam extends across the river Tees, and is of such height as, when the river is in ordinary state, salmon passing up the river can rarely, if ever, leap over it, and are frequently seen attempting to do so in vain; that, at the end of the dam on the Durham shore, there is an opening through it which is locally

termed a fish-lock, and a sketch of which, and a model thereof, were put in evidence before the magistrates, and which sketch was annexed to the case. It was also proved, that, on the up-stream side of the fish-lock, two grooved openings of the width of about three feet each are formed. In the grooves of each of these openings, a movable sliding-door, formed of wood and iron, is placed, which can be raised or lowered in the grooves at pleasure. When these dams are down, as it was proved they were on the 7th of October last and on eight subsequent days, no salmon can pass through the fish-lock. Within the lock, and at a distance of about three feet from the sliding-doors, *and down the stream, another frame is placed, in which, when [*200 the fish-lock was used for taking salmon, hecks were placed, the doors above being opened. It was proved that these hecks had been used by the appellant during the last fishing-season, up to the 19th of May last, when they were removed: but, on the said 7th of October and on the said eight subsequent days, the doors were neither removed nor drawn up out of the water, and consequently an impassable obstruction was presented to the free passage of salmon through the lock. It was also proved that a similar fish-lock, with similar grooves, doors, and hecks, existed at the Yorkshire end of the dam; and that the circumstances already described with reference to the lock at the Durham end of the dam were equally applicable to this.

It was proved that the locks in question were used by the appellant for taking salmon during the last fishing-season, and up to the said 19th of May last, when he discontinued using them, by an order from his landlord's agent, and upon the representation of the inspectors of salmon-fisheries that the locks were not in accordance with law; and that they still remained in the same state as they were then so used, except that the hecks had been taken out: but no proof was given that the locks had been actually used for the purpose of catching fish after the said 19th of May. What had not been removed, were, the doors above described.

It was also proved that the doors or gates of the locks were necessary to the catching of fish in the lock, as well as for the purposes of the mill.

It was also proved that "locks" and "cruives" were synonymous terms.(a)

For the appellant, it was contended that the lock *was not [*201 on the said 7th of October or other subsequent days "a fishery for salmon," or a "crib, box, or cruive," within the meaning of the section under which the information was laid; and that it was a fishing mill-dam, not used for fishing, but for the purposes of the mill only, after the said 19th of May, the use of which was regulated by other sections of the act.

It was also contended on behalf of the appellant, that the appellant, if otherwise liable to penalties under the said 20th section, was not so, inasmuch as the removal of or raising up the doors would injure the milling power.

A further objection was taken by the appellant, that the fish-locks and doors were part of the freehold, and the appellant could not

(a) See amended case, post, p. 202.

legally remove them; and that to do so would injure his landlord's property, and therefore he was not liable to the penalty imposed by the 20th section.

The magistrates being of opinion that the evidence given before them as aforesaid proved that the appellant was the occupier of a fishery within the meaning of the 20th section of the Salmon Fishery Act, 1861, and that the case was within the operation of that section, gave their determination against the appellant, in manner before stated.

If the court should be of opinion that the conviction was legally and properly made, and that the appellant was liable as aforesaid, then the conviction was to stand: but, if the court should be of opinion otherwise, then the information was to be dismissed.

Upon the case coming on for argument in Trinity Term, 1863, *Manisty*, Q. C., for the appellant, prayed that it might be sent back to the magistrates to be amended, on the ground that the magistrates *202] who stated the case were mistaken in their finding that it *was proved before them that "locks" and "cruives" were synonymous terms; and also that it was proved that the keeping the sluices down was essential to the working of the mill, and that their removal would be ruinous to the milling-power.

Davidson, contra, submitted that, though the court might, if they found the case to be imperfectly stated, remit it to the magistrates for amendment, (a) such a course had never been adopted upon an ex parte statement. [WILLES, J.—I remember once having made an order at Chambers for the amendment of a case where it appeared that the magistrates' clerk had made a mistake; and the court thought I had done right.]

PER CURIAM.—Let the case be remitted to the magistrates to be amended, especially with respect to "locks" and "cruives" being synonymous terms, and by stating "whether or not it was proved that the milling-power of the appellant's mill would be ruinously affected by the removing or keeping open the doors in the case mentioned or referred to."

The case having accordingly been remitted to the magistrates, they returned it with the following amendment:—

"We do hereby state that it was *not* proved by evidence before us that 'locks' and 'cruives' are synonymous terms; and that it was *not* proved before us that the milling-power of the appellant's mill would *203] be *ruinously affected, but it *was* proved that such milling power would be in some degree injuriously affected by the removing or keeping open the doors in the said case mentioned or referred to."

The amended case came on for argument at the sittings in banco after last Hilary Term.

Manisty, Q. C., for the appellant.—The case as now stated leaves little to add to what was said upon the former occasion,—14 C. B. N. S. 111 (E. C. L. R. vol. 108). It is found that the thing in question is a mill-dam so constructed that it might be used as a fishing mill-dam.

(a) See *The York Tire and Axle Company*, app., *The Rotherham Local Board of Health*, resp., 4 C. B. N. S. 362 (E. C. L. R. vol. 93), where it was held that an application to send back for amendment a case stated under this statute, may be entertained before the day of argument.

The case now finds that it was not proved that "locks" and "cruives" are synonymous terms: there is nothing, therefore, on the face of the case to explain the obscure and unintelligible language of the act, or to enable the court to see that the conviction is right. Further, the case finds that the removing or keeping open the doors, though it would not *ruinously* affect the milling-power of the appellant's mill, would in some degree *injuriously* affect it. This, therefore, is one of the dams to which the proprietors of the fishery may, under s. 23 of the act, obtain the leave of the Home Office to attach a fish-pass, paying compensation to the mill-owner: and that would evidently meet the justice of the case.

Davidson, contra.—The last observation applies only to the case of "dams," which by the interpretation clause (s. 4) are described to be "all weirs and other *fixed* obstructions used for the purpose of damming up water." This is a "fishing mill-dam," which by the same section is defined to mean "a dam used or *intended to be used* partly for the purpose of catching or facilitating the catching of fish, and partly for the *purpose of supplying water for milling or [*204 other purposes:" and it is found in the case that this fishing mill-dam has been made available for the catching of salmon, and may at any time be made so again. The object of the statute was, to remove all obstructions in salmon rivers, so as to secure a free run for the fish up stream to the spawning grounds. The 12th section enacts that "no fishing mill-dam, although lawfully in use at the time of the passing of the act by virtue of a grant or charter or immemorial usage, shall be used for the purpose of catching salmon, unless it have attached thereto a fish-pass of such form and dimensions as shall be approved of by the Home Office, nor unless such fish-pass has constantly running through it such a flow of water as will enable salmon to pass up and down such pass." The evidence stated in the case clearly shows that the appellant was guilty of the offence charged; for, notwithstanding it was not *proved* that these locks were "cruives," the court will inform itself of the meaning of words used in an act of parliament, and will hold, as on the former occasion, that these were "cruives, cribs, or boxes," within the prohibition.

Manisty, in reply.—It may be, that, if the mill-owner uses the dam for catching fish, he would be bound to put a fish-pass: otherwise not. It was proved before the magistrates that all the appliances for that purpose had been removed. One main object of the legislature, doubtless, was, to remove all undue obstructions to the passage of the fish up the stream. But they have also sought carefully to preserve the rights of mill-owners. The things here described clearly are not cribs or boxes; and the respondent has failed to prove them to be "cruives."

Cur. adv. vult.

*WILLES, J., now delivered the judgment of the court: (a) [*205

This was in effect a rehearing of the case of *Hodgson, app., Little, resp.*, 14 C. B. N. S. 111 (E. C. L. R. vol. 108), with these differences in the statement of facts, viz.—first, that the finding that "locks and cruives were synonymous terms" is struck out,—secondly, that it is found that lifting or removing the sliding-doors would to some degree injuriously affect, but not ruinously, the milling-power,—and, thirdly,

(a) The judges present at the argument were, Erle, C. J., Williams, J., and Willes, J.

that it is found that the sliding-doors or hatches were necessary for the fishery as much as for the mill.

The question is, whether a conviction of this appellant under the 20th section of the 24 & 25 Vict. c. 109, the act to amend the laws relating to fisheries for salmon in England, was valid.

The appellant had a fishing mill-dam with a fish-lock through it. At the head of the lock was a sliding-door or hatch, which moved as usual in grooves. When this door was down no salmon could pass. Within three feet of these, down stream, was a frame in which the up-stream hecks of the fish-lock were placed when the lock was used for taking salmon. When this was down, the sliding-door or hatch was raised. That was of course done to cause a rush of water through the lock, against which the fish, following his natural instinct to ascend the river, would make what way he could, and so, swimming up the lock, and being stopped by the up-stream hecks, and prevented from returning by the down stream hecks or inscales, would be caught in a trap. The final capture might perhaps be aided by letting down the sliding-door or hatch, so as to leave the fish high *206] and dry, though this is not at all necessary in addition to the first operation of lifting the sliding-door or hatch to cause the stream and consequent attraction to the fish in the first instance, in order to make such door or hatch part of the fishing apparatus; if even that be essential when it is clearly part of the fishing mill-dam, and an obstruction whereby the fish is prevented from passing through the lock or box. The appellant took out the hecks, but left down the hatch, by which the water was effectually prevented from passing through the box of the fishery. It is obvious that the 20th section, as applied to this class of fisheries, would be futile if proprietors or occupiers could comply with it by letting the fish through the heck only to be stopped by the hatch; as it were, letting them through the portcullis, and stopping them at the gate. Accordingly, the justices convicted the appellant under that section; and hence this appeal.

It was argued on behalf of the appellant, that language is used in this act which the court cannot understand so as to give effect to,—for instance, “crib,” “cruive,” “inscales;” and that enough is not found by way of explanation to justify the conviction. To this it must be answered that we are bound to inform ourselves of the meaning of the words used by the legislature; and although, unfortunately, these and like words have, through the decay of the salmon-fisheries in this part of the kingdom, become generally forgotten, they are well understood by persons acquainted with the subject, and they will be found explained in Jamieson’s Dictionary.(a) At least the word “box” is strictly applicable to the fish-lock in question, and *207] indeed to the greater part of these contrivances, in which the fish is enticed into an enclosed place where he is “cribbed” and confined in a cruive or grufte by hecks and inscales.

So, again, the word “obstruction” is a known word of the most general import: and that the sliding-door or hatch is “an obstruction to the free passage of fish in or through the box,” within the appel-

(a) “Cruive,” a box or enclosure, made with spars, like a hen-crib, generally placed in a dam or dike that runs across a river, for the purpose of confining the fish that enter into it.

“Inscales,” the hecks or racks at the lower end of the cruive-box.

lant's fishing mill-dam, is clearly made out in fact; so that, if that was "a fishery" within the act, the case falls within the very words of the 20th section.

That this fishing mill-dam is "a fishery," was decided in the former case between the same parties. It was originally intended for fishing. It had been formerly used for fishing. It was still capable of being used for fishing, by putting in the hecks, and lifting the sliding-door or hatch. That it had not for some time been used as a fishery, only shows that it was a fishery out of use, not that it was not a fishery in the sense of being made and calculated for that use. This was a fishing mill-dam, and none the less a fishery because it also was of use as a mill-dam. The interpretation clause is express,—*"Fishing mill-dam shall mean a dam used or intended to be used partly for the purpose of catching or facilitating the catching of fish, and partly for the purpose of supplying water for milling or other purposes."*

It was further urged that the conviction was wrong, because of the damage to the working of the mill likely to result from lifting the sliding-door or hatch; which damage, it was said, the legislature could not have intended to impose upon the mill-owner. The answer, however, is clear; and it is supplied by the statute itself. The act is one for redressing a great mischief and wrong, in the destruction of a supply of food of great, even national importance. It recites that "the *salmon fisheries of England have of late years been [*208 greatly injured, and, for the purpose of increasing the supply of salmon, it is expedient to amend the laws relating to fisheries of salmon in England." Then follows a series of enactments against poisoning fish, fishing in particular deadly modes, amongst others with fixed engines (this expressly not to apply to "fishing mill-dams"), against fishing weirs and fishing mill-dams unless lawfully in use at the time of the passing of the act "by grant, charter, or immemorial usage," against taking unseasonable or young fish, or fishing or selling fish in the close time. Then follows the 20th section, by which, without qualification or exception, the "proprietor or occupier of every fishery for salmon shall within thirty-six hours after the commencement of the close season cause to be removed and carried away from the waters within his fishery," *inter alia*, "all obstructions to the free passage of fish in or through the cruives, cribs, and boxes within his fishery." Then come in order the sections which provide for a weekly close time. The 23d and 24th sections follow, for providing fish-passes for existing dams: and the 23d is important, because it is subject to the express qualification, not to be found in s. 20, "so that no injury be done to the milling-power." Then comes the 25th section, as to passes for future dams, with no such qualification. The 26th section provides for the supply of water to passes. Then follow sections for imposing restrictions as to the construction of fishing-weirs and dams, and others for more effectually enforcing the act.

From this review, it is clear that fishing mill-dams were considered by the legislature to be injurious to the salmon-fishery, and were therefore placed under special restrictions; that, where it was intended that the provisions of the act were not to apply if they *inter- [*209 fered with the milling-power, that was expressly stipulated;

that there is no such restriction in s. 20; that that section renders penal the continuance of any obstruction to the passage of fish through the box of a fishery; that the fishing mill-dam is a fishery expressly dealt with as such by the statute; and that, as the sliding-door or hatch was kept down at a prohibited time, and constituted an obstruction to the free passage of fish through the box, the conviction was right, and ought to be affirmed, and, as on the former occasion, with costs.

Conviction affirmed, with costs.

THE QUEEN, on the Prosecution of THOMAS BAINARD CHAPPELL, on behalf of THE VESTRY OF THE PARISH OF SAINT GEORGE HANOVER SQUARE, Appellants; THOMAS SPARROW, Respondent. April 22.

The 75th section of the Metropolis Local Management Act, 1862 (25 & 26 Vict. c. 102) enacts that "no building, structure, or erection shall, without the consent in writing of the metropolitan board of works, be erected beyond the general line of buildings in any street, place, or row of houses in which the same is situate, &c., such general line of buildings to be decided by the superintending architect to the metropolitan board of works for the time being."

A magistrate having decided, upon summons, that a small conservatory consisting of an iron frame (glazed) projecting beyond the wall of the house, but not beyond the shop-front, was not an "erection" within the statute, and that it was not beyond the "general line of buildings" in the street,—the court upheld his decision.

Semble, that the certificate of the superintending architect as to the "general line of buildings" is not conclusive.

THE following case was stated for the opinion of the court pursuant to the 20 & 21 Vict. c. 43:—

This was a summons under the Metropolis Local Management Act, 25 & 26 Vict. c. 102, s. 75, charging that the defendant on 1st of July, 1863, in the parish of St. George, Hanover Square, Middlesex, with-
 *210] in the metropolitan police-district, did unlawfully erect a *certain erection, to wit, a conservatory, without the consent in writing of the metropolitan board of works, beyond the general line of buildings in a certain street called Half-Moon Street, in the said parish, county, and district, the distance of such line of buildings not exceeding fifty feet from the highway; contrary to the statute, &c.

2. Half-Moon Street is about forty feet wide, containing twenty-three houses on the east side and twenty-four on the west, built at different times, before 18 Victoria, at different heights and levels, as suited the respective builders. The defendant's house, No. 1 on the east side, is the corner house next Piccadilly. That part of the shop-front which faces Half-Moon Street projects three feet beyond the front wall of the house at the first floor, forming a ledge on the top extending three feet three inches in width from that wall. This shop-front existed in its present state before the 18 & 19 Vict. c. 120.

3. In April, 1863, the defendant took out the window with its frame from the room on the first floor of his house looking into Half-Moon Street, and substituted for it a case or thing principally composed of glass set in light iron framing, about the same height as the old window, and four feet six inches wide, and projecting two feet six inches from the house wall, and resting on the above-mentioned shop-

front: its extreme edge being nine inches nearer the house than the extreme edge of the shop-front.

4. This case or thing of glass and iron is the matter complained of as an "erection," and forms the only window of the said room. The district-surveyor of the parish approved of it as being of incombustible materials, within the metropolitan building acts.

5. At the hearing before the magistrate, the district-surveyor stated that it was a "projecting window." *A builder of experience [*211 also called it a projecting window. The surveyor employed by the parish for thirty years called it a "projection," and not a "projecting window," but said that a bow-window would be a "projecting window." The superintending architect of the metropolitan board of works styled it a "conservatory" (as in the summons).

6. The defendant did not obtain the consent of the metropolitan board of works for the above alteration of his house, but got that of the inhabitants of the four houses next his own, lower down from Piccadilly, before putting up the glass and iron in question.

7. Evidence was given that there was nothing in this thing of glass and iron unsightly or obstructing light or air, or inconsistent with the general character of either side of the street. On the same (east) side, the house No. 5 has a bow-window in the first and second floors projecting from the house wall in like manner, but further into the street. Several balconies project from other houses on the same (east) side at different levels and distances of projection from the house walls. The last house on the east side has a shop-front projecting in the same manner as at No. 1: all these projections are legal, having been erected before the 18 & 19 Victoria.

8. Contradictory evidence was given on the point whether the glass and iron in question was in point of fact beyond or within the general line of buildings on the east side of Half-Moon Street. The superintending architect of the metropolitan board of works produced his certificate in writing, that the "main front of the buildings forming the row of houses aforesaid, is the general line of buildings in the said row," as shown in the plan annexed to his certificate and signed by him. He also stated before the magistrate that the glass and iron in question called by him a *conservatory, was [*212 beyond that general line of buildings; the word "general" being now substituted for "regular,"—on which word, as occurring in 18 & 19 Vict. c. 120, s. 143, now repealed, the decision in *Tear v. Freebody*, 4 C. B. N. S. 228 (E. C. L. R. vol. 93), took place.

9. In support of the summons, it was urged that the above-mentioned certificate was final, and precluded further inquiry by the magistrate. This was denied by the defendant, as such a construction would prevent all corrections of even self-evident errors in such certificate or plan. It was also said, that, not only was the glass and iron in question within the extreme edge of the shop-front, and within the true "general" line of buildings in the said row of houses forming the east side of Half-Moon Street, but that it was also in point of fact within the line laid down in the said plan by the said superintending architect as the "general line of buildings" in that row of houses.

10. After viewing the locus in quo, the magistrate called to mind

that the summons did not charge this case or thing of glass and iron as a projecting window under s. 119 of the first Metropolis Local Management Act, 18 & 19 Vict. c. 120, nor as a "projection" under the Metropolitan Buildings Act, 18 & 19 Vict. c. 122, s. 26, nor as "a thing affixed" to or projecting from "a building, wall, or other structure," under the same act, 18 & 19 Vict. c. 122, Part II, "Dangerous Structures," nor as contrary to any unrepealed section of 57 G. 3, c. xxix., called "Michael Angelo Taylor's Act,"—and decided that the thing in question, called by some a "conservatory," by others a "projecting window," and by others a "projection," was not an erection within the intent and meaning of s. 75 of the Metropolis Local Management Act, 25 & 26 Vict. c. 102, upon which the summons proceeded; having regard to the words "building or structure" *213] next preceding it in that section, and to the above-mentioned statutes still in force: and he dismissed the summons accordingly.

11. The magistrate doubted whether "the general line of buildings" certified by the superintending architect could in point of law be questioned before him. Subject to that doubt, he was of opinion, that, having regard to the peculiar irregularities of the shop-fronts, bow-windows, verandahs, and balconies projecting as above stated from the house-walls on the east side of Half-Moon Street, as well as on the west side, and legally so projecting, having been there before the 18 & 19 Victoria,—the true general line of buildings might not be along the main walls of the houses in the row. He also thought, that, in point of fact, the extreme edge of the thing of glass and iron in question was not only within the extreme edge of the legally existing shop-front, but also within the line certified by the superintending architect as the "general line:" but he did not dismiss the summons on either of these grounds, but on that already stated.

12. Being requested to state a case under the 20 & 21 Vict. c. 43, he prayed the opinion of the court,—first, "whether in point of law the thing of glass and iron in question, placed as above described, must be held to be an erection within s. 75 of the 25 & 26 Vict. c. 102,—secondly, if the said glass and iron be such an 'erection,' whether the line certified and decided by the superintending architect of the metropolitan board of works as the 'general line of buildings,' does in point of law preclude all further inquiry whether it is the true general line in each particular street or row, or not."

If the magistrate's decision was reversed, the parties sought that the summons should stand, and the case be remitted to him to make such order as under the guidance of the court should seem fit.

*214] If his decision was confirmed, the defendant sought that it be confirmed with costs.

The following certificate of the superintending architect was appended to and was to be taken as part of the case:—

"Decision of superintending architect.

"Whereas, by the 75th section of the Metropolis Management Amendment Act, 1862, it is provided that no building, structure, or erection, shall, without the consent in writing of the metropolitan board of works, be erected beyond the general line of buildings in any street, place, or row of houses in which the same is situate, in

case the distance of such line of buildings from the highway does not exceed fifty feet, or within fifty feet of the highway when the distance of the line of buildings therefrom amounts to or exceeds fifty feet, notwithstanding there being gardens or vacant spaces between the line of buildings and the highway; such general line of buildings to be decided by the superintending architect of the metropolitan board of works for the time being:

"And whereas Mr. Capron, solicitor, and Mr. Richmond, surveyor, on behalf of the vestry of St. George, Hanover Square, and Mr. Sparrow, of No. 1, Half-Moon Street, Piccadilly, with Mr. Gillow, his builder, have severally appeared before me, and been heard regarding a conservatory erection attached to the front of the said house No. 1, Half-Moon Street, at the level of the one pair story, and within the line of the shop front, and beyond the face or front of the buildings forming a row of houses on the east side of Half Moon Street, extending northward from Piccadilly, in the parish of St. George, Hanover Square, and have required me to decide the general line of buildings in such street, as provided in the said statute: Now, therefore, having considered the several matters, I the undersigned, *being the superintending architect to the metropolitan board of works, [*215 do hereby, pursuant to the said act, decide that the main fronts of the buildings forming the row of houses aforesaid is the general line of buildings in such row, as shown on the plan hereto annexed and signed by me.

"GEORGE VULLIAMY, superintending architect to the metropolitan board of works."

Brett, Q. C. (with whom was *Streeten*), for the appellants.—The second question submitted by the magistrate for the opinion of the court, is, whether the line certified and decided by the superintending architect of the metropolitan board of works as "the general line of buildings," in point of law precludes all inquiry whether it is the true general line in each particular street or row, or not. That depends upon the construction to be put upon the 75th section of the 25 & 26 Vict. c. 102, which enacts that "no building, structure, or erection shall, without the consent in writing of the metropolitan board of works, be erected beyond *the general line of buildings* in any street, place, or row of houses in which the house is situate, in case the distance of such line of buildings from the highway does not exceed fifty feet, or within fifty feet of the highway when the distance of the line of buildings therefrom amounts to or exceeds fifty feet, notwithstanding there being gardens or vacant spaces between the line of buildings and the highway,—such general line of buildings to be decided by the superintending architect to the metropolitan board of works for the time being." It then goes on to state what shall be the consequences of a breach of this interdiction. "And in case any building, structure, or erection be erected, or be begun to be erected or raised, without such consent, or contrary to the terms and conditions on which the same may have been granted, it shall be lawful for *the vestry of the parish or the board of works for the district in [*216 which such building or erection is situate, to cause to be made complaint thereof before a justice of the peace, who shall thereupon issue a summons requiring the owner or occupier of the premises, or the

builder or person engaged in any work contrary to this enactment, to appear at a time and place to be stated in the summons to answer such complaint; and if at the time and place appointed in such summons the said complaint shall be proved to the satisfaction of the justice before whom the same shall be heard, such justice shall make an order in writing on such owner or occupier, builder, or person, directing the demolition of any such building or erection, or so much thereof as may be beyond *the said general line so fixed as aforesaid*, within such time as such justice shall consider reasonable, and shall also make an order for the payment of the costs incurred up to the time of hearing; and, in default of the building or erection complained of being demolished within the time limited by the said order, the said vestry or board shall forthwith enter the premises to which the order relates, and demolish the building or erection complained of, and do whatever may be necessary to execute the said order, and may also remove the materials to a convenient place, and subsequently sell the same, as they think fit; and all expenses incurred by the said vestry or board in carrying out the said order and in disposal of the said materials, may be recovered by the said vestry or board from the owner or occupier of the said premises, or the builder or person engaged in the work, either by action at law, or in a summary manner before a justice of the peace." It is submitted that the superintending architect is constituted the arbitrator to decide conclusively what is "the general line of buildings." The magistrate *217] took a different *view. If the certificate be not conclusive, the words of the section have no meaning. [ERLE, C. J.—What do the parties go before the magistrate for? Is he to act under the command of the superintending architect, or to act judicially?] The language of the statute is quite inconsistent with a review of the architect's decision by the magistrate. [BYLES, J.—Does the act provide any appeal against the decision of the superintending architect?] None. [BYLES, J.—Your contention, then, is, that the magistrate has no power to go into the question whether the erection or building is within or without the general line of buildings, but only whether it is within or without "*the said general line so fixed as aforesaid*."] Precisely so. [WILLES, J.—Is the superintending architect's decision a judgment in rem? Is it to be infallible? KEATING, J.—It may be that a new architect may set out a different line.] The court will give a reasonable interpretation to the unambiguous language of the legislature. The word "general" was introduced into s. 75 of the 25 & 26 Vict. c. 102, in consequence of the decision of this court in *Tear v. Freebody*, 4 C. B. N. S. 228 (E. C. L. R. vol. 93). (a)

The other question is, whether the thing described in the case is an erection within the 75th section. In the former act, 18 & 19 Vict. c. 120, s. 143, the word "building" only was used. In the Amendment act, the words "structure or erection" are added, for the very purpose of meeting such an objection as this. If the thing described be a structure or erection, the answer to the first question must be in the affirmative.

(a) Where the court held that "the regular line of buildings," in the 143d section of the Metropolis Local Management Act, 18 & 19 Vict. c. 120, did not mean a strict mathematical line, but a substantially regular line.

David Keane, Q. C., contra.—The first question *which the magistrate puts, is, not whether the thing described is an [*218 erection within the statute, but whether in point of law he was bound to hold it to be so; or, in other words, whether, if the matter were before a jury, a finding in the negative would be a verdict against evidence. The reasons which the magistrate has given in paragraph 10 are cogent to show that this was not a “structure” within the act. The language of the 76th section (a) shows that all the words in s. 75 mean the same thing, viz. “building” alone. [BYLES, J.—What meaning, then, do you give to the words “the said general line so fixed as aforesaid?”] If that is taken to mean that the defining of the line by the superintending architect or the board of works is to be absolutely and finally binding upon everybody, there would be nothing for the magistrate to decide, and this appeal would not be arguable. [WILLES, J.—The words are, “to be decided by the superintending architect.” This was evidently intended as a protection to the owner or builder, not as a scourge put in the hands of the architect.]

ERLE, C. J. (stopping *Keane*).—The matter referred to us by the first question, is, “whether in *point of law the thing of glass [*219 and iron in question placed as above described, *must* be held to be an erection within s. 75 of the 25 & 26 Vict. c. 102.” For the reasons he has stated, the magistrate was of opinion that it was not: and I think it is impossible to lay down that in point of law he was bound to hold that it was. (b) Then, the magistrate has put to us a second question, which is one of very general importance, viz. whether, if the thing be an erection within the statute, “the line certified and decided by the superintending architect of the metropolitan board of works as the ‘general line of buildings,’ does in point of law preclude all further inquiry whether it is the true general line in each particular street or row, or not,”—in other words, whether the legislature intended that the certificate of the superintending architect should settle the matter finally and past all inquiry. I think that was not the intention of the legislature. Suppose a street where there are several projections varying in extent, what is the superintending architect to take to be “the general line of buildings?” And, when he has laid down one line, what is to prevent his successor in the office from laying down another? That would manifestly be very inconvenient. I cannot think that the decision of one superintending architect is to settle for ever, beyond all future inquiry, that which may in the case of a long street like Oxford Street involve an outlay of inconceivable amount. I think the legislature intended this provision

(a) “The metropolitan board may, in giving consent for any *erection* beyond the regular line of the *buildings* in any street, annex any condition to the consent given by the board; and, in case such *erection* shall not be made in accordance with the consent of the board, or be in any manner altered or raised without their consent, the board may enter and demolish or alter the *buildings* or *structure*, or any part thereof, and recover all expenses, or may impose any penalty not exceeding 40s., to be summarily recovered, for every day during which any *building* or *structure* being a contravention of such condition shall exist after notice from the said board or any officer of the board to remedy the complaint.”

(b) See *Newman, app., Baker, resp.*, 8 C. B. N. S. 200 (E. C. L. R. vol. 98). There, the magistrate having, upon the construction of the 5th rule of the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), decided that a certain place, being a row of houses forming part of a line of thoroughfare, was a street, this court declined to interfere with his decision.

*220] for the protection of the owner or builder. If he *is within the line marked out by the superintending architect, he is safe: if, on the other hand, he obtains the leave of the board to deviate from the general line, he is equally safe. It is when it is sought to pull down buildings which are supposed to be improperly erected, that the jurisdiction of the magistrate is called in aid. The vestry claim to demolish a structure. The party goes to the magistrate for protection. If he is satisfied that the complaint is well founded, and that the structure or erection is beyond the general line of buildings, he may order its demolition. It is nowhere said that the certificate of the superintending architect shall be final and conclusive of the question. It is for the magistrate to say whether or not the statute has in substance been transgressed; and he is not bound by the line which the superintending architect has marked out. I think the appeal should be dismissed.

WILLES, J.—I am of the same opinion. As to whether or not this was an erection within the meaning of the statute, I give no opinion. The magistrate thought it was not. Upon the other point, I entirely agree with my Lord. The section in question is an exceedingly penal one. It seems upon the face of it to be highly improbable that the legislature should have intended to make the superintending architect the absolute judge, in the manner contended for. The question is whether the words are express. The section is about as ill framed as could well be conceived. After enacting that no building, structure, or erection shall without the consent of the board be erected beyond the general line of buildings in any street, &c.—such general line of buildings to be decided by the superintending architect to the metropolitan board of works,—it proceeds to enact, that, in case any *221] building, *structure, or erection be erected, &c., without such consent, or contrary to the terms and conditions on which the same may have been granted, it shall be lawful for the vestry, &c., to cause to be made complaint thereof before a justice of the peace, who shall thereupon issue a summons requiring the owner or occupier of the premises, or the builder or person engaged in any work contrary to this enactment, to appear, &c. These words must be qualified with reference to the rest of the section. It having been established that the erection is without the general line of buildings, the magistrate is to decide whether the complaint is proved to his satisfaction. It must be proved that the general line has been fixed by the superintending architect, and further that the erection is without that line, and that the consent of the board to the deviation has not been obtained. See the absurdity. This thing was built in April, 1863, at a time when there was no decision of the superintending architect as to the general line of buildings to guide the party. Then comes his decision three months afterwards, that that which was done in April was ab initio a violation of the law! It appears to me that the decision of the magistrate was well founded, and that the appeal should be dismissed with costs.

BYLES, J.—I agree as to the first question with my Lord and my Brother Willes. The magistrate has pronounced a decision; and there is nothing on the face of the case to show that decision to be wrong. As to the hypothetical question which he has put to us, it

is unnecessary for the court to express any opinion upon it: but I do not mean by this to say that I dissent from what has fallen from the rest of the court.

KEATING, J.—I also am of opinion that the decision *of the magistrate was clearly right. He dismissed the summons. The [*222 only proper question for us, is, whether he was right in so doing. In the first place, he found that the thing described in the case was not an “erection” within the statute. That was a sufficient ground for dismissing the summons. In the next place, he found that, assuming that the line laid down in the plan by the superintending architect was “the general line of buildings” in that row of houses, the erection in question was within that line. Having these two good reasons for dismissing the summons, the magistrate goes on to suggest a doubt whether the general line of buildings certified by the superintending architect could in point of law be questioned before him. I entirely agree with the rest of the court that this appeal should be dismissed, and with costs.

Appeal dismissed, with costs.

WOOD v. THE STOURBRIDGE RAILWAY COMPANY.

April 22.

1. One who sustains a private and particular injury from the diversion or obstruction of a public road by the works of a railway company, which diversion or obstruction, if done without the sanction of an act of parliament, would give a right of action, is entitled to compensation under the Lands Clauses Consolidation Act, 1845.

2. One P., the owner in fee of an estate called “the Lyde Field estate,” having sunk a shaft for working coals thereunder, staked and set out a road across the Lyde Field estate from a public highway on the west to the colliery, and to the east to another public highway. The road from the west to the colliery being formed, but the remainder to the east being only staked out, P. in 1832 agreed with one A. for the sale to him of a piece of land which was described in the conveyance (not executed until the 1st of December, 1840,) as being “bounded on the north by the road leading to the said Purser’s colliery,” “together with the free use and enjoyment by A., his heirs, appointees, tenants, and assigns, of the above-mentioned road leading to the said colliery at all times and on all occasions, he and they contributing a proportionate part of the expense of keeping such road in repair.” In 1846, A. conveyed this piece of land, together with the right of way, to the plaintiffs:—

Held, that the deed of 1840 conveyed to A. and his assigns the right to use the road across the Lyde Field estate to the east as well as to the west,—though part of it was only staked out at the time of sale.

3. In December, 1854, P. conveyed another piece of land to the plaintiffs, which was described in the conveyance as “bounded on the north by a road laid out by the said P. across the Lyde Field estate from a road leading from the Lye Waste into the road leading from Dudley to Cradley, together with the free use and enjoyment by the grantees, their heirs, appointees, tenants, and assigns, of the above-mentioned road leading across the said Lyde Field estate at all times and on all occasions, on contributing a proportionate part of the expense of keeping it in repair.” At the date of this conveyance the road across the Lyde Field estate had been completely formed throughout its whole length, but a chain or bar had been placed by P. across the road to the east of the plaintiffs’ premises, and their right to use that part of the road was occasionally disputed by him:—

Held, that, under the deed of December, 1854, the plaintiffs acquired a right of way over that part of the road across the Lyde Field estate which lay to the east of their premises, for the use of the premises conveyed by that deed.

4. In 1858, the plaintiffs purchased from one B. a piece of land (abutting upon the land conveyed to A. by the deed of December 1st, 1840,) which was described in the conveyance as “adjoining at one end thereof to a certain road or highway leading from Cradley Forge to Rowley Regis.” At the time of this purchase, the only mode of access to this piece of lan

was by means of an opening at the west corner upon the road described in the conveyance. By an act for the formation of the Stourbridge railway, a new road was directed to be made in lieu of a portion of the old road numbered 4 on the plan deposited under the standing orders, and that so much of the road numbered 22 thereon as should lie between the point at which such new road terminated and the point where the road numbered 4 met the road numbered 22, should cease to be used as a public highway, "without prejudice to the existing rights of the owners and occupiers of adjoining lands at all times thereafter to use the same for all purposes:"—

Held, that this reserved to the plaintiffs a right of way to the whole of their premises over that part of the road numbered 22 which lay between the new road and the point where the road numbered 4 met it.

5. No compensation can be claimed under the Lands Clauses Consolidation Act, 1845, for inconvenience sustained from the authorized crossing on a level of a public road by a railway.

THIS was a special case stated for the opinion of the court under the following circumstances:—

*223] By an indenture dated the 17th of April, 1863, and *made between Messrs. George Wood, Thomas Wood, William Wood, and Henry Wood, of the one part, and the Stourbridge Railway Company of the other part,—after reciting that Messrs. Wood alleged, that, in exercise of powers contained in the act under which the said company were authorized to construct a railway from Stourbridge, in the county of Worcester, to Old Hill, in the county of Stafford, being The Stourbridge Railway Act, 1860, the company had by the execution of the works injuriously affected certain premises at Cradley Heath, in the parish of Rowley Regis, belonging to the Messrs. Wood, by obstructions placed on the public highways leading to the said property during the progress of the works and since the completion of the works, and by totally stopping up the said highways, and depriving them of access to their said properties, and for which *224] the promoters of the said company's *undertaking had made them no compensation; and that Messrs. Wood on the 20th of March last gave the company notice in writing that they required them to pay them compensation in respect of such injuriously affecting the premises, and that the amount of their claim for compensation by reason of the premises was 5000*l.*, and further, that, unless the said company were willing to pay them the amount of the compensation so claimed, and entered into a written agreement for that purpose within twenty-one days after the receipt by the company of such notice, it was their desire that the amount of such compensation should be settled by a jury according to the provisions contained in the act or acts of parliament in that case made and provided; and that, if the said company should fail to pay the said sum, or to enter into such written agreement as aforesaid, they required the company within twenty-one days after the receipt of that notice to issue their warrant to the sheriff of the county of Stafford, or other proper officer, to summon a jury for settling the amount of the said compensation; and that the company accordingly issued their warrant to the sheriff of Staffordshire, which had not been executed; and that the said company disputed the right of Messrs. Wood to such compensation, and they and the company had agreed to abandon the proceedings under the warrant, and had agreed to refer the said claim to compensation, and the amount thereof, to be settled in manner thereafter mentioned,—the said parties thereto covenanted and agreed with each other that the proceedings under the said warrant should

be abandoned, and that the said claim of the Messrs. Wood for compensation, and their right thereto, and the amount thereof, should be and the same was thereby referred to the award of a barrister, who should be at liberty to, and who at the *request of the said [*225 parties or either of them should, state any question or questions of law on which any of the rights of the parties or either of them might depend in his award in the shape of a special case or otherwise; and that, if he found it right or convenient to do so, he might make an interlocutory award stating such questions and special case, and afterwards make a final award of and concerning the matters referred to him: And the parties thereby bound themselves to obey, abide by, fulfil, and keep such award, and that those presents might be made a rule of Her Majesty's Court of Common Pleas at Westminster, on the application of either of the parties thereto.

Upon the hearing of the said reference before him, the said parties requested the arbitrator to state the following case for the opinion of the court, pursuant to the power contained in the said deed of submission.

In the year 1832, Joseph Purser was the owner in fee simple of the Lyde Field estate, situate in the parish of Rowley Regis, in the county of Stafford, which consisted of the whole of the land coloured green on the plan A. annexed to this case, and also of the two pieces of land coloured pink and yellow thereon. The access to this land on the west was by means of a road set out for its use under an enclosure award, extending from the road called the "Old Road" (which was a public highway from the Lye Waste and Cradley Forge to Rowley Regis and Dudley) to the point marked G. on the said plan, running between land on the north which belonged to one Taylor, and on the south which belonged to one Joseph Billingham; and at the end next the highway there was a gate which was kept fastened by Purser, and no one else had any right of access by that road.

In the year 1832, Purser commenced sinking a shaft to raise the coals under the said Lyde Field estate, *at the point marked [*226 "Purser's Colliery" on the said plan; and, for this purpose, he made a road from the point G. across the Lyde Field estate to the said spot where he was sinking his shaft, and also staked and set out a road from that spot into the public highway on the east thereof, marked "From Cradley to Dudley" on the said plan.

Afterwards, in the year 1832 or 1833, Purser agreed with Joseph Aston to sell him the said piece of land coloured pink on the said plan, of which Aston at once took possession. No conveyance thereof was executed till the 1st of December, 1840; on which day, by an indenture made between the said Joseph Purser of the one part, and the said Joseph Aston of the other part, Purser, in pursuance of the agreement, conveyed to Aston in fee-simple the said piece of land coloured pink, described therein as "bounded on the north by the road leading to the said" Joseph Purser's Colliery, "together with the free use and enjoyment by the said Joseph Aston, his heirs, appointees, tenants, and assigns, of the above-mentioned road leading to the said colliery, at all times, and on all occasions, he and they contributing a proportionate part of the expense of keeping such road in repair."

At this time, the shaft had been sunk to the coal, and the said colliery was in full work, and the said road thereto both from the west and the east had been formed, and was constantly used; but against the east end of the said piece of land so conveyed, Purser put up a bar or chain, which at night and on Sunday was kept closed and fastened by Purser, but it was open from six in the morning till six at night on every day but Sunday.

Aston afterwards, in 1846, conveyed this piece of land, together with this right of way, to the claimants, Messrs. Wood: and it is now vested in them in fee; *and they have erected thereon extensive forges and coke-hearths; and the principal entrance to their works is situate at the point marked H. on the said plan. Purser repeatedly refused to permit Messrs. Wood to use the road east of the said bar or chain, and turned their carts and wagons back: but they contended they had a right to use it, and frequently used it, nevertheless: and conversations took place between Messrs. Wood and Mr. Purser upon the subject. [*227

By an indenture dated the 30th of December, 1854, and made between the said Joseph Purser of the one part, and the said Messrs. Wood of the other part, Purser conveyed to Messrs. Wood in fee the piece of land coloured yellow on the said plan, described as bounded on the north "by a road laid out by the said Joseph Purser across the Lyde Field estate, from a road leading from the Lye Waste into the road leading from Dudley to Cradley; together with the free use and enjoyment by the said George Wood, Thomas Wood, William Wood, and Henry Wood, their heirs, appointees, tenants, and assigns, of the above-mentioned road leading across the said Lyde Field estate, at all times and on all occasions, on contributing a proportionate part of the expense of keeping it in repair."

Purser kept up the bar and chain as before, and continued occasionally to stop Messrs. Wood from using the road east of the bar, except by his permission as above mentioned.

Afterwards, in 1858, Messrs. Wood purchased from Joseph Billingham the piece of land and two houses coloured red on the said plan; and by an indenture dated the 18th of January, 1858, and made between the said Joseph Billingham of the one part, and the said Messrs. Wood of the other part, Billingham conveyed the said piece of land coloured red to the *said Messrs. Wood, in fee simple, described therein as adjoining at one end thereof to a certain road or highway leading from Cradley Forge to Rowley Regis: on this they also erected further buildings. [*228

At the time of this purchase, the only mode of access to this last-mentioned piece of land was by means of an opening at the point marked I. on the plan, from the said road. Billingham had no right of way over the road across Lyde Field estate.

In the year 1860, the Stourbridge Railway Act was introduced into parliament; and the plan marked B. is a copy of so much of the plan deposited under the standing orders as relates to the spot in question.

At this time, and until after the passing of the act, Lord Dudley was tenant for life, under the will of John William Earl of Dudley, of the land on each side of the road numbered 4, and the whole of the land on the west side of the road numbered 22 on that plan (except

so far as the land conveyed by Billingham to Messrs. Wood may be said to adjoin it), and on the east side the said road numbered 22 was bounded by land part of which on the upper side next the line of railway belonged to one Hingley, and, on the lower side, extending to the road into Lyde Field estate, belonged to one Taylor.

That bill was passed into a law; (a) and, during its progress through the committee of the House of Commons, section 36 was introduced, by which a new road was directed to be made in lieu of No. 4, and that road was thenceforth to belong to Lord Dudley, and it was provided that so much of the road numbered 22 as should lie between the point at which such new road terminated and the point where the *229] road numbered 4 met the road numbered 22, should cease to be *used as a public highway, "without prejudice to the existing rights of the owners and occupiers of *adjoining lands* at all times thereafter to use the same for all purposes."

In 1862, the railway company proceeded to make their railway at this spot; and they made to the satisfaction of Lord Dudley a new road marked blue on the said plan A., as a substitute for the said road numbered 4: and they made their railway in the direction shown on the said plan, crossing the road numbered 22 by a level crossing, with gates on the north and south sides of the railway.

The servants of the railway contractor and the West Midland Railway Company, who are the lessees of the Stourbridge Railway Company, and work the Stourbridge Railway (but without the knowledge or sanction of the directors of the Stourbridge Railway Company), thenceforth stopped all conveyances passing to or from the works of Messrs. Wood over the last-mentioned part of the road numbered 22, alleging that they were not entitled to any right of way to them over that part.

If Messrs. Wood cannot obtain access to their works by means of this road, their property in them will be injuriously affected to a very large extent: and, even if they can obtain access to them by those means, it will be injuriously affected to some, but to a much smaller extent, by reason of the stoppages at the gates, and a fall and rise at the crossing of the railway, and also by reason of the distance by the new road being greater than by the old road No. 4, to certain points.

Under these circumstances, the parties requested the arbitrator to state this case, and the following questions for the opinion of the court:—

*230] 1. Whether Messrs. Wood are persons whose property *is under the above circumstances injuriously affected, so as to entitle them to claim compensation under the Lands Clauses Consolidation Act, 1845, and whether in respect of the whole or any and what part of the said property?

2. Whether Messrs. Wood have now any right of way to their premises, or any and what part of them, over the part of the road numbered 22 which lies between the new road and the point where the road numbered 4 met it?

3. Whether, by the conveyance of December 1st, 1840, Joseph Aston obtained, and the Messrs. Wood now have, any right of way over that part of the road across Lyde Field estate which lies to the

east of their premises, for the use of that part of their premises which was conveyed by that deed?

4. Whether by the conveyance of December 30th, 1854, the Messrs. Wood obtained and have now any right of way over that part of the road across the Lyde Field estate which lies to the east of their premises, for the use of any, and, if any, what part of them?

Gray, Q. C. (with whom was *H. Matthews*), for the plaintiffs.(a)—At the time of the passing of the **Stourbridge Railway Act*, [*231 1860 (23 & 24 Vict. c. xciv.), the plaintiffs, who are chain-cable and anchor makers, were possessed of three pieces of land on which their works were carried on, and which are respectively coloured red, yellow, and pink upon the plan. They originally formed part of the Lyde Waste, to which the road from Stourbridge led. The road numbered 4 on plan B. was a public road, which the plaintiffs had a right to use and did use: the road numbered 22 was an occupation way which was material to the plaintiffs as a means of access to their collieries from which coal was brought for the purposes of their works. By the works of the Stourbridge Railway Company the plaintiffs' access to their works by both these roads was injuriously affected, and their right to compensation, and its amount, were referred to an arbitrator. It was admitted that the plaintiffs had been deprived of the road numbered 4: but it was denied that their use of the road numbered 22 was affected; and upon this part of the case the question will be whether the plaintiffs had a right of way to the east or only to the west. The piece of land coloured red was purchased by Messrs. Wood in 1858, from one Billingham. In respect of that they had no right of way along the occupation way leading to Purser's colliery. As to the land coloured pink, their title was derived under an agreement made by one Purser in 1832 with one Aston. Prior to entering into this agreement, Purser had commenced to sink a shaft to raise the coals under the Lyde Field estate; and for the purpose of this colliery he made a road from the point G. on the plan A., **across* [*232 the Lyde Field estate, to the spot where he was sinking the shaft; and he also staked and set out a road from that spot eastward into the public highway marked on the plan "From Cradley to Dudley." The conveyance was not executed until the 1st of December, 1840. In it the land was described as "bounded on the north by the road leading to Purser's colliery;" and the land was expressed to be conveyed "together with the free use and enjoyment by Aston, his heirs, appointees, tenants, and assigns, of the above-mentioned road leading to the said colliery, at all times and on all occasions, he and

(a) The points marked for argument on the part of the plaintiffs were as follows:—

"1. That the whole of Messrs. Wood's property is injuriously affected, so as to entitle them to claim compensation under the Lands Clauses Consolidation Act, 1845, under the circumstances mentioned in the case:

"2. That Messrs. Wood have not now any right of way over that part of the road numbered 22 which lies between the new road and the point where the road numbered 4 joins the road numbered 22:

"3. That, by the conveyance of the 1st of December, 1840, Mr. Aston obtained, and Messrs. Wood now have, a right of way over the road across the Lyde Field estate from their premises, to the westward only, and not to the eastward of those premises:

"4. That, by the conveyance of the 30th of December, 1854, Messrs. Wood obtained, and now have, a right of way over the road across the Lyde Field estate from their premises to the westward only, and not to the eastward of those premises."

they contributing a proportionate part of the expense of keeping such road in repair." This deed, it is submitted, is to be construed by the state of things existing at the time of the agreement in 1832. At that time the road was only formed from the west to the colliery. It is true, a road had been staked out to the eastward of the colliery: but the grant did not extend to that. On the 30th of December, 1854, Purser conveyed to Messrs. Wood in fee the piece of land coloured yellow, which is described as bounded on the north by a road laid out by Purser across the Lyde Field estate from a road leading from the Lye Waste into the road leading from Dudley to Cradley; together with the free use and enjoyment by Messrs. Wood, their heirs, appointees, tenants, and assigns, of the above-mentioned road leading across the said Lyde Field estate, at all times and on all occasions," &c. That, it is submitted, is only a grant of a road from the west to the works of the plaintiffs. [WILLES, J.—The "road across the Lyde Field estate" means the whole road. BYLES, J.—The whole of the road was completely formed at the date of this conveyance.] The words "across the Lyde Field estate" are merely words of description of the road which Purser had laid out. The arbitrator finds that the

*233] *bar and chain which Purser had placed at the east of this road were still kept up. [BYLES, J.—The putting up of bars and chains is not so material in the case of a private or occupation way: in the majority of cases they are only put up for the purpose of excluding a claim of right by the public.] In 1858, Messrs. Wood purchased from Billingham the piece of land coloured red on the plan, which was described in the conveyance as adjoining at one end thereof to a certain road or highway leading from Cradley Forge to Rowley Regis. The only mode of access to this land at the time was by means of an opening at the point marked I. on the plan from the road. Billingham had no right of way over the road across the Lyde Field estate. It is admitted that the road numbered 4 is closed: and it is submitted that the effect of the 36th section of the Stourbridge Railway Act, 1860, is, to deprive the plaintiffs (as to the red) of the road numbered 22 also. That section enacts, "that, instead of the proposed diversion of the public road numbered 4 in the parish of Rowley Regis, as shown on the deposited plans, it shall be lawful for the company to make and they shall make a new road over the lands of which the said Earl of Dudley is tenant for life under the said will of the said John William Earl of Dudley, in a direction and manner to be determined by the said William Earl of Dudley, or other the person or persons for the time being entitled under the will of John William Earl of Dudley, deceased, and so that such new road shall not cross the railway; and such new road shall be of the clear width of thirty feet, and as to the levels thereof shall be constructed both as regards the siding secondly above mentioned and otherwise to the reasonable satisfaction of the said Earl of Dudley or other the person or persons for the time being entitled as aforesaid; and after the completion of

*234] such new road *the present road numbered 4 as aforesaid, so far as the same is shown on the said plans so deposited as aforesaid, shall vest in the said Earl of Dudley and other the person or persons entitled under the will of the said John William Earl of Dudley, for the same estate and interest as he and they respectively

have in the land on either side of the present road, but shall not be thereafter used as a private road; and so much of the road numbered 22 in the parish of Rowley Regis as will lie between the point at which such diverted road shall terminate as aforesaid and the point at which the said road numbered 4 as aforesaid now joins it, shall thenceforth cease to be used as a public highway, without prejudice to the existing rights of the owners and occupiers of *adjoining lands* at all times thereafter to use the same for all purposes." The question is, whether the owner or occupier of the piece of land coloured red is the owner or occupier of land *adjoining* to the road numbered 22. It is submitted that it adjoins No. 4, and not No. 22, and therefore the right is taken away. The only remaining question is the first, viz., whether Messrs. Wood are persons whose property is under the circumstances "injuriously affected," so as to entitle them to claim compensation under the Lands Clauses Consolidation Act, 1845,—and whether in respect of the whole or what part of their property. In any view of the case they clearly are. A public road is closed against them: and it is now clearly settled, that, where an individual sustains a private and particular injury from the obstruction of access by the public to his shop, or from interruption to his business by the stopping up or diversion of a road, he is entitled to maintain an action where the act is not done with the sanction of an act of parliament, and to compensation under the Lands Clauses Consolidation Act, 1845, where it is: *Wilks v. The *Hungerford Market Company*, 2 N. C. 281, 2 Scott 446; *Glover v. The North Staffordshire Railway Company*, 16 Q. B. 912 (E. C. L. R. vol. 71); *Chamberlain v. The West End of London and Crystal Palace Company*, 2 Best & Smith 605 (E. C. L. R. vol. 110); *Senior v. The Metropolitan Railway Company*, 32 Law, J., Exch. 225; *In re Newbold and The Metropolitan Railway Company*, 14 C. B. N. S. 405 (E. C. L. R. vol. 108). It is plain from the statements in the case that the plaintiffs here are injuriously affected as to the whole of their property. [ERLE, C. J.—The Plaintiffs are tenants in fee of three several pieces of land, coloured respectively red, pink, and yellow. If they have the right of way in respect of the red, have they not the right in respect of the pink and yellow also?] The yellow and pink are held under distinct titles: they are not lands "adjoining." The fact of their belonging to the same owner as the red, does not make them adjoin.

Huddleston, Q. C. (with whom was *Davis*), for the defendants.(a)—

(a) The points marked for argument on the part of the defendants were as follows:—

"1. That the claimants are not persons whose property has been injuriously affected, so as to entitle them to compensation in respect of any part of the property:

"2. That the claimants are owners and occupiers of 'adjoining lands' within the meaning of the saving clause in s. 36 of the special act:

"3. That, if the claimants are not owners or occupiers of lands adjoining the road, they are not persons whose property has been injuriously affected, so as to entitle them to compensation:

"4. That the compulsory substitution of the new road, as mentioned in s. 36 of the special act, was the agreed satisfaction to all persons interested for all injury accruing to property by reason of the interference by the company with the roads numbered 4 and 22 on the plan marked B. annexed to the case:

"5. That the damage resulting to the property by reason of gates at the level crossing, and of the fall and rise of the road at the crossing, and by reason of the distance being increased to certain points, is of too remote a character on which to found a claim for compensation:

*236] [ERLE, C. J. As to the piece of land *coloured yellow, the matter seems to be very clear. As to the road numbered 22, the right of way remains, and therefore the plaintiffs have sustained no damage as to that. The difficulty is as to the road numbered 4 and the land coloured pink.] As to the land coloured pink, the question is, whether by the conveyance of December 1st, 1840, Aston obtained, and the plaintiffs now have, any right of way over that part of the road across Lyde Field estate which lies to the east of their premises, for the use of that part of their premises which was conveyed by that deed. The facts are these:—In 1832, Purser, who was the owner in fee simple of the Lyde Field estate, commenced sinking a shaft to raise the coals under that estate, and for that purpose he made a road from the point G. on plan A. (on the west) to the spot where he was sinking the shaft; and he also staked and set out a road (or a continuation of that road) from the shaft eastward to the public highway leading from Cradley to Dudley. This being the state of things, Purser shortly afterwards agreed with Aston to sell him the piece of land coloured pink. In the conveyance, which was not executed until the 1st of December, 1840, the land was described as “bounded on the north by the road *leading to Purser’s Colliery,” “together *237] with the free use and enjoyment by the said J. Aston, his heirs, appointees, tenants, and assigns, of the above-mentioned road *leading to the said colliery, at all times, and on all occasions,*” &c. At the date of the conveyance, the shaft had been sunk to the coal, and the colliery was in full work; and the road thereto *both from the west and the east* had been formed and was constantly used: but Purser put up a bar or chain against the east end of the piece of land so conveyed to Aston, and occasionally disputed the right of the plaintiffs (who in 1846 purchased Aston’s interest) to use that portion of the road which led to the east. The question is, whether the right of way conveyed by the deed of 1840 was not a right to use the road to the eastward as well as to the westward. It leads to the colliery from the Lye Waste on the one side, and to the colliery from the Cradley and Dudley road on the other. [BYLES, J.—Are they not two roads? Fleet Street is the road leading to Temple Bar from the east: the Strand is the road leading to Temple Bar from the west. If the parties had intended that a right of way over the road at both sides should pass, would they not have said so?] Take Exeter Hall,—the Strand is the road leading to that building from either way. Then, if the red adjoins the road numbered 22, the Messrs. Wood have access thereto through No. 22. [ERLE, C. J.—The loss of the road numbered 4 causes them to go a long way round: as to that the plaintiffs are clearly entitled to compensation.] If the closing words of s. 36 of the 23 & 24 Vict. c. xciv. override 22 and 4, Messrs. Wood have still a private right of way over it; for, it provides that “so much of the road numbered 22 as

“6. That the damage mentioned in the preceding point is damage incident to the user of the road by all persons:

“7. That the claimants have a right of way by grant over the road across Lyde Field estate to the east of their premises:

“8. That such right of way as is mentioned in the last preceding point was granted as well by the deed of December 1st, 1840, as by the deed of December 30th, 1854:

“9. That the claimants have a way of necessity over the road mentioned in the seventh point.”

should lie between the point at which such new road terminated and the point where the road numbered 4 met the road numbered 22, *should cease to be used as a *public highway*, without prejudice [*238 to the existing rights of the owners and occupiers of adjoining lands at all times thereafter to use the same for all purposes." [ERLE, C.J.—I believe we are all of opinion that the plaintiffs are entitled to compensation in respect of such damage as they have sustained from the loss of the road numbered 4 as would constitute a cause of action against the company if they had stopped that way without the sanction of an act of parliament. As to the land coloured yellow, the plaintiffs have a clear right of way to the east as well as to the west. With respect to the piece of land coloured pink, there is some little doubt whether the right exists both ways. A private road must be in reason for the purpose of getting to a public highway.]

Gray, in reply.—The road mentioned in the deeds of 1840 and 1854 is merely the northern boundary of the lands conveyed, and gives the right to the westward only. [ERLE, C.J.—Since the making of the railway, you have neither more nor less than you had before. In respect of the diversion at No. 4, you are entitled to compensation. Crossing on a level is not the subject of compensation: *Caledonian Railway Company v. Ogilvy*, 2 Macq. 229.] By the act of parliament, we have No. 22 only as a private way.

ERLE, C. J.—As to the first and second questions submitted to us upon this special case, I am of opinion that the Messrs. Wood are persons whose property is injuriously affected by the company's works, so as to entitle them to compensation under the Lands Clauses Consolidation Act, 1845. They are clearly entitled to compensation in respect of the stoppage of the road numbered 4, if the case falls within the principle of **Chamberlain v. The West End of London and Crystal Palace Railway Company*, 2 Best & Smith [*239 605 (E. C. L. R. vol. 110), that is, if they have sustained a private and particular injury by that stoppage, in respect of which they might have maintained an action against the company if it had not been done under the sanction of an act of parliament. If the inconvenience or annoyance which they sustain is such only as is common to all the Queen's subjects, no action would lie, and the case therefore is not one for compensation under the act of parliament. As No. 4 led from No. 3 to other property of Messrs. Wood, and they have lost the convenient communication therewith, they are entitled to compensation. As to No. 22 it has ceased to be a public road, but "without prejudice to the existing rights of the owners and occupiers of adjoining lands at all times hereafter to use the same for all purposes." Those words save to the Messrs. Wood as adjoining owners the right they had. It was a public right of way before, and they have it still. As to the crossing on a level, that is not a subject of compensation, according to the decision of the House of Lords in *The Caledonian Railway Company v. Ogilvy*, 2 Macq. 229: it is an inconvenience which is common to all the Queen's subjects, and one for which no particular or individual remedy exists. This disposes of the first and second questions.

The third question is, whether by the conveyance of the 1st of December, 1840, Mr. Aston obtained, and Messrs. Wood now have,

any right of way over that part of the road across Lyde Field estate which lies to the east of their premises, for the use of that part of their premises which was conveyed by that deed. My construction of the grant is, that it gave to Aston and his assigns one right of way over the whole of Purser's road to the east and to the west until they *240] came to a *public road. As to this, the facts are, that, in 1832, Purser commenced sinking a shaft to raise coals under the Lyde Field estate at the point marked "Purser's Colliery" on the plan; and for this purpose he made a road from the point G. across the Lyde Field estate to the spot where he was sinking his shaft, *and also staked and set out a road from that spot into the public highway on the east thereof*, marked "From Cradley to Dudley" on the plan. In 1832 or 1833, Purser agreed to sell to Aston the piece of land coloured pink on the plan; and in the conveyance, which was executed on the 1st of December, 1840, the subject of the grant was described as "bounded on the north by the road leading to Purser's Colliery, together with the free use and enjoyment by Aston, his heirs, appointees, tenants, and assigns, *of the above-mentioned road leading to the said colliery*, at all times and on all occasions, he and they contributing a proportionate part of the expense of keeping such road in repair." To my mind, when a road is staked out for the purpose of passage, it is as much a road as if properly formed and made with granite or flint. At the time of the conveyance in 1840, the road had been made both from the west and east: but I agree that the construction is to be the same as if the conveyance had been executed in 1832. Mr. Gray contends that the words of the grant gave Aston and his assigns a right of way only along so much of the road as leads westward to a public road. But, if I had been the purchaser of the land coloured pink, and was informed that I was entitled to use the road leading to the colliery, I should have been very much surprised if told that my right of way was limited to a user of it to the westward. If you may go eastward to the colliery, you may go eastward to the public road. I think the whole was one road, not two. Purser *241] had a colliery lying between the public road *leading from Cradley to Dudley and another public road leading to the road from Stourbridge to Brierly Hill. He sets out a way from the one to the other to his colliery, and grants to Aston and his tenants and assigns a right to use that road. This clearly gives the right to go either way.

The fourth question is, whether by the conveyance of December 30th, 1854, Messrs. Wood obtained and have now any right of way over that part of the road across the Lyde Field estate which lies to the east of their premises for the use of any, and, if any, what part of them. This question applies to the piece of land coloured yellow in the plan A. As to this, the conveyance is to my mind clear. The land is described as bounded on the north "by a road laid out by Purser across the Lyde Field estate from a road leading from the Lye Waste into the road leading from Dudley to Cradley, together with the free use and enjoyment by the said George Wood, &c., their heirs, appointees, tenants, and assigns, of the above-mentioned road leading across the said Lyde Field estate, at all times and on all occasions, on contributing a proportionate part of the expense of keeping it in

repair." That is in substance a right of way across the Lyde Field estate into the Dudley and Cradley road. From the pink and yellow, therefore, there is a right of way reserved to Messrs. Wood to the eastward.

WILLES, J.—I am of the same opinion. The first question is, whether the plaintiffs are entitled to compensation in respect of the loss of the road numbered 4, by which they could more conveniently and in a shorter time go about their business. I am clearly of opinion that that is the proper subject of compensation under the statute. As to the second question, I am of opinion that Messrs. Wood have a right of way to *their premises over the part of the road num- [*242 bered 22 which lies between the new road and the point where the road numbered 4 meets it. They have a right to go to and from their land generally. The word "adjoining" in s. 36 of the Stourbridge Railway Act, 1860, is not confined to "at the side of." Whether it extends to the red may well be tested by seeing what Lord Dudley gets. By s. 36 the company are empowered to make a new road over the lands of Lord Dudley; and the section goes on to enact, that, "after the completion of the said new road, the present road numbered 4 as aforesaid, so far as the same is shown on the said plans so deposited as aforesaid, shall vest in the said Earl of Dudley, &c., for the same estate and interest as he and they respectively have in the land on either side of the present road, but shall not be thereafter used as a public road; and so much of the road numbered 22 in the parish of Rowley Regis as will lie between the point at which such diverted road shall terminate as aforesaid and the point at which the said road numbered 4 as aforesaid now joins it, shall thenceforth cease to be used as a public highway, without prejudice to the existing rights of the owners and occupiers of adjoining lands at all times thereafter, to use the same for all purposes." Thus the road numbered 22 continues on till the red portion of Messrs. Wood's land abuts upon it. They therefore have a right to the use of it for the red, and also for their other contiguous land. As to the third question,—whether by the conveyance of December 1st, 1840, Aston obtained, and the Messrs. Wood now have, any right of way over that part of the road across Lyde Field estate which lies to the east of their premises, for the use of that part of their premises which was conveyed by that deed,—I must admit that that is a question of some nicety. Where *you find in a conveyance a way granted in general terms, you [*243 must of necessity hold that the use of the way in any manner in which it could be used is granted by the conveyance. The only question for consideration here is, whether that portion of the road which was only staked out at the date of the agreement in 1832 is to be taken to be included in the conveyance of 1840. It would seem that, in 1832, Purser had completely appropriated a strip of land for a road leading to his colliery. Part of it was completely formed; the remainder only staked out. Now, with reference to a private road, the only definition you can give of it, is, a strip of land appropriated to the purposes of passage from one point to another: nothing more is necessary to make a private way. If appropriated throughout its length, though not formed, it is still a way. Assuming that the whole had been staked out only, would the conveyance be therefore inope-

native? Clearly not. Then, look at the conveyance: the piece of land is described as "bounded on the north by the road leading to the said Joseph Purser's colliery;" and then the deed goes on,—“together with the free use and enjoyment by the said Joseph Aston, his heirs, appointees, tenants, and assigns, of *the above-mentioned road leading to the said colliery,*” &c. Does that limit the right to use the road to the west? I apprehend it does not. Both parts of the road, from the east and from the west, “lead to” the colliery. The right may be limited, as in *Henning v. Burnett*, 8 Exch. 187. But here the only special words applying to the road or the use of it, are, the words “leading to the said colliery.” That, I think, sufficiently establishes the right over each part, and therefore the whole is appropriated. This is *à fortiori* as to the yellow.

*244] BYLES, J.—I am of the same opinion. I never felt *any difficulty as to Messrs. Wood's right to compensation under the Lands Clauses Consolidation Act for the obstruction of the more convenient access to their works. Nor have I felt any doubt as to the portions of land coloured yellow and red. I have entertained some doubt as to the land coloured pink; but not sufficient to induce me to differ from the rest of the court.

KEATING, J.—I concur with my Lord and my Brother Willes as to all the questions submitted to us. Judgment accordingly.(a)

(α) The rule was ultimately drawn up as follows:—"1. That Messrs. Wood are persons whose property is under the circumstances injuriously affected so as to entitle them to compensation under the Lands Clauses Consolidation Act, 1845, in respect of the whole of their property referred to in the said case. 2. That the said Messrs. Wood have now a right of way to the whole of their premises over the part of the road numbered 22 which lies between the new road and the point where the road numbered 4 meets it. 3. That, by the conveyance of the 1st of December, 1840, Joseph Aston obtained and Messrs. Wood now have a right of way over that part of the road across Lyde Field estate which lies to the east of their premises, for the use of that part of their premises which was conveyed by that deed. 4. That, by the conveyance of December 30th, 1854, the Messrs. Wood obtained and have now a right of way over that part of the road across the Lyde Field estate which lies to the east of their premises, for the use of the premises conveyed by that deed."

An award was afterwards made by the arbitrator assessing the compensation due to Messrs. Wood in accordance with the above judgment.

***245] *STRICK and Others v. THE SWANSEA CANAL COM-
PANY. April 25.**

By a canal act the company of proprietors were entitled to demand a fixed sum for goods carried upon any part of the canal, "which said respective rates should be equal throughout the whole length of the said intended canal." By a subsequent public act, 8 & 9 Vict. c. 28, proprietors of canals were empowered from time to time to alter or vary the tolls granted to them, "either upon the whole or for any particular portion or portions of such canals, according to local circumstances, or the quantity of traffic, or otherwise, as they should think fit,"—with a proviso that such tolls were to be charged equally to all persons, and after the same rate, whether per mile, or per ton per mile, in respect of all boats, &c., of the like description passing along or using the same portion of the canal, and all goods, &c., of the like description conveyed or propelled in a like boat, &c., passing along or using *the same portion* of the said canal, &c., *under the like circumstances, &c.* :—

Held, that it was competent to the company to take a proportionably less toll per ton per mile for goods carried a given distance (five miles) along *any part* of the canal, than for goods carried less than that distance.

Also, that it was competent to the company to agree to carry at a lower rate for a particular

individual, in consideration of a large guaranteed minimum toll, in order to enable them to enter into a successful competition with a rival line of railway.

THIS was an action brought by the plaintiffs to recover back from the defendants the sum of 99*l.* 19*s.* 1*d.* paid by the plaintiffs under protest, and alleged by them to be in excess of the sum due and payable by them to the defendants for rates or tolls for the carriage of coals on the Swansea Canal, as hereinafter mentioned. The following case was stated under a judge's order for the opinion of the court:—

1. The Swansea Canal Company was incorporated by an act of parliament of the 34 G. 3, ccix., which authorized the construction and maintenance of a navigable canal from the town of Swansea, in the county of Glamorgan, to the parish of Ystradguulais, in the county of Brecon, and, in consideration thereof, the taking, receiving, and recovering to and for the use and benefit of the company of proprietors therein named of the several rates thereafter mentioned for the carriage and conveyance of all coal, stone, timber, merchandise, and other goods, matters, and things which should be carried or conveyed upon any part of the said canal, that is to say, a fixed rate per ton per mile varying in amount according to the description of goods so carried or conveyed. And by the 67th section of the act it was provided, that the said respective rates should be equal throughout the whole length of the said intended canal; and that *the said company [*246 of proprietors should have full power from time to time at any general assembly to lower or reduce all or any of the said rates, and again to raise the same, but so as not to exceed the several rates mentioned in the said act.

2. The maximum rate mentioned in the act for the carriage of coal upon the said canal is 1½*d.* per ton per mile.

3. Under the powers of this act the canal was made, and has ever since been and is now maintained and very extensively used for the carriage of coals and other minerals and goods.

4. By the statute 8 & 9 Vict. c. 28,—after reciting that certain canal companies and commissioners or trustees of several navigable rivers had been authorized and empowered to levy certain tolls, and which tolls, &c., are for the most part required to be levied at one uniform rate per ton or per mile throughout the entire length of the said navigations and rivers respectively, without regard to any difference of circumstances, &c.; and that powers had been given to railway companies by the Railways Clauses Consolidation Act, 1845, to vary the tolls, rates, and charges upon railways so as to accommodate them to the circumstances of the traffic thereon; and that greater competition for the public advantage would be obtained if canal companies and commissioners or trustees of navigable rivers had the like powers granted to them,—it was enacted that it should be lawful for the company of proprietors of any canal or navigable river, or their lessees, &c., from time to time to alter or vary the tolls, rates, and duties granted to them, or by them respectively authorized, &c., to be levied and received, either upon the whole or upon or for any particular portion or portions of such canals or navigations, with their branches, &c., according to local circumstances, or the quantity of traffic or

*247] otherwise, as they should think fit: Provided always, that, *in no case were the tolls so fixed to exceed the amount which were by the special acts authorized to be levied or received."

5. The 2d section of the same act contains a proviso "that the tolls levied under the powers thereof are to be charged equally to all persons and after the same rate, whether per mile or per ton per mile, in respect of all boats, barges, and other vessels of the like description, passing along or using the same portion of the canal, navigation, &c., and all goods, animals, articles, and things of the like description conveyed or propelled in a like boat, barge," &c.

6. Under the alleged authority of this latter act, the defendants, at a general assembly of the proprietors of the navigation, held on the 3d of July, 1860, fixed the rates or tolls hereinafter next mentioned, to be charged from and after the 1st of January, 1861, upon goods conveyed on the canal; and they have ever since charged and demanded the same accordingly, that is to say,—

	Per ton per mile.
"For all goods, wares, merchandise, and other things	2d.
"For all tin and tin-plates conveyed upon the navigation of this company a greater distance than nine miles, and for all iron castings, bar-iron, metal, charcoal, coke, cinders, ashes, chalk, rotten stone, copperas, and calamine ore	1½d.
"For all pig-iron, coals, culm, timber, stones, tiles, bricks, clay, lime, limestones, sand, manure, and waste-vitriol	1d.
"For all iron-stone, calcined iron-ore, and iron-ore	¾d.
"For all the above goods, articles, and things, other than lime, limestones, manure, tin, tin-plates, charcoal, coke, *cinders, ashes, and rotten stone, conveyed upon the navigation a less distance than five miles, an additional or further toll of	½d.
"For all tin, tin-plates, drain-pipes, and earthenware, conveyed a less distance than four miles, an additional or further toll of	1d.

7. The plaintiffs work collieries at Clydach, near the canal, and use the said navigation for the purpose of carrying and conveying the coals worked from their said collieries at Clydach to their wharf near Swansea, the whole distance being 4½ miles, of which 3½ miles are part of the navigation of the defendants, and the remaining part, 1½ miles of the navigation belonging to the Duke of Beaufort. For the use of so much of the navigation as belongs to the defendants, the plaintiffs are charged at and after the rate of 1½d. per ton per mile, agreeably with the third and fifth items of the schedule of tolls above mentioned.

8. Other traders whose coals are carried on and over the said navigation to Swansea from places more distant from Swansea than the plaintiffs' loading place at Clydach aforesaid, and which coals pass over five miles or upwards of the defendants' navigation, are charged by the defendants at and after the rate of 1d. per ton per mile, agreeably with the third item of the said schedule.

9. The defendants have also, acting as they allege under the powers of the said act of the 8 & 9 Vict. c. 28, entered into an agree-

ment with certain persons trading under the style or firm of The Ystalyfera Iron Company, under which the defendants charge the said iron company in respect of all coal carried or conveyed by that company over any part of the navigation of the defendants, whether for long or short distances, the sum of $\frac{3}{4}d.$ per ton per mile.

*10. The portions of the Swansea Canal belonging to the defendants over which the coals of the iron company are carried, varies from $3\frac{1}{2}$ miles to $10\frac{1}{2}$ miles. [*249]

11. None of the traffic of the iron company is carried merely and solely over the same measured portion of the defendants' navigation as that passed over by the coals of the plaintiffs. And at the place where that traffic is brought on the canal, the defendants are subject to an active competition with the Swansea Vale Railway Company; whereas no such competition exists at or near Clydach: and the quantity of coals carried by the plaintiffs is comparatively very small.

12. Advantages also are secured to the defendants by their agreement with the Ystalyfera Company in respect of a guaranteed minimum of tolls to be paid by that company for coal and other things to be sent over the canal by them, and in other respects; none of which advantages exist as regards the plaintiffs, with whom the defendants have no special agreement.

13. The agreement with the Ystalyfera Company, of which a copy accompanied the case, was to be referred to by either party.

The questions for the opinion of the court were,—whether the defendants are entitled under the said acts of parliament, or either of them, to charge the plaintiffs for the carriage of the said coal a greater sum or toll than at and after the rate of $\frac{3}{4}d.$ per ton per mile, being the rate charged to the Ystalyfera Company; and, if yea, whether the defendants are entitled to charge the plaintiffs in respect of such carriage a greater sum or toll than at and after the rate of $1d.$ per ton per mile.

If upon these questions the opinion of the court should be in the affirmative, judgment of nonsuit was to be entered, with costs; but, if upon either of these *questions the opinion of the court should be in the negative, judgment was to be entered for the plaintiffs; and, if the toll in the opinion of the court to be charged should be at the rate of $\frac{3}{4}d.$ per ton per mile, then the judgment was to be entered for the sum of 99*l.* 19*s.* 1*d.*, with costs; and if at the rate of $1d.$ per ton per mile, then for the sum of 66*l.* 12*s.* 8*d.*, with costs. [*250]

Welsby (with whom was *Hayes*, Serjt.), for the plaintiffs.(a)—The

(a) The points marked for argument on the part of the plaintiffs were as follows:—

"1. That the defendants were not authorized by the statute 8 & 9 Vict. c. 28 to alter or vary the tolls and rates levied and received by them under the 34 G. 3, c. cix., upon any distance over nine miles or any distance less than five miles of their navigation, but only upon the whole or some particular defined portion of the same, and therefore that the charge of $1\frac{1}{4}d.$ per ton per mile for the conveyance of the plaintiffs' coals, as stated in the case, when the coals of other traders from places more distant from Swansea than the plaintiffs' landing place to Swansea, passing over more than nine miles of the navigation, are conveyed at a charge of $1d.$ per ton per mile, is as to the excess, viz. $\frac{1}{4}d.$, a violation of the 67th section of the defendants' act and of the 2d section of the 8 & 9 Vict. c. 28:—

"2. That the agreement of the defendants with the Ystalyfera Iron Company was also a breach of the above-mentioned enactments, and disentitled the defendants to claim from the plaintiffs or any trader whose coals are conveyed over the same part of the navigation a larger sum than that received from the iron company under the said agreement, viz. $\frac{3}{4}d.$ per ton per mile."

first question is in a great measure dependent upon the second. By the 67th section of the 34 G. 3, c. cix., under which the canal was constructed, the company are entitled to demand fixed rates for goods carried upon any part of the canal, "which said respective rates shall *251] be equal throughout *the whole length of the said intended canal:" and they had power (as against everybody) "to lower or reduce all or any of the said rates, and again to raise the same, as they should think proper, not exceeding the rates before mentioned, as often as it should be deemed necessary for the interests of the said navigation." But no power is given them to vary the rates over any *portion* of the canal. Then came the 8 & 9 Vict. c. 28, by the 1st section of which it is enacted that it should be lawful for the proprietors of any canal, &c., from time to time to alter or vary the tolls, &c., granted to them, or by them authorized to be levied and received, *either upon the whole or for any particular portion or portions of such canals or navigations*, according to local circumstances, or the quantity of traffic or otherwise, as they should think fit,—so as not to exceed the sums originally fixed. That means some particular defined portion of the canal; it was not intended to allow the company to alter or vary the rates for passing over any undefined portion of their canal; for, the 2d section contains a proviso that the tolls levied under the powers of the act were to be charged equally to all persons and after the same rate, whether per mile or per ton per mile, in respect of all boats, barges, &c., of the like description passing along or using the same portion of the canal, and all goods, &c., of the like description conveyed or propelled in a like boat, barge, &c., passing along or using the same portion of the said canal, &c., under the like circumstances; and that no reduction or advance in any tolls or charges for the use of any such canal, &c., shall be made either directly or indirectly in favour of or against any particular company or person passing along or using the same portion of such canal, &c. To charge 1½d. per ton per mile where the distance traversed is less than five *252] miles, and 1d. per ton per mile *where it is more than five miles, is clearly a violation of the equality clause. [BYLES, J.—You contend that it is a question of locality, not of distance.] Precisely so. The 90th section of the Railways Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 20, which contains a similar proviso,—“that all such tolls be at all times charged equally to all persons, and after the same rate, whether per ton per mile or otherwise, in respect of all passengers, and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine passing only over the same portion of the line of railway under the same circumstances,” &c.,—clearly shows what was meant here. A “particular portion” does not mean any part of the canal. [BYLES, J.—This provision is in *pari materiâ* with the second section of the Railway Traffic Act, 17 & 18 Vict. c. 31.] It clearly points to some particular defined portion of the canal. The other question, which is substantially the same, is, whether, the canal company having made an agreement with the Ystalyfera Iron Company to carry coals for them for ½d. per ton per mile, it is not competent to the plaintiffs to contend that a higher charge made to them is excessive. and a violation of the

67th section of the special act as well as of the 2d section of the 8 & 9 Vict. c. 28.

Lush, Q. C. (with whom was *Garth*), for the defendants.(a)—The defendants are under no such restriction *as has been con- [*253 tended for on the part of the plaintiffs. Under the special act, no differential tolls could be allowed. The 8 & 9 Vict. c. 28, which was intended (as the preamble shows) to place canals and railways upon the same footing in this respect, was passed for the express purpose of relieving the proprietors from that inconvenience. The 2d section of the 8 & 9 Vict. c. 28 is to be read as if the word "only," which is found in the 90th section of the 8 & 9 Vict. c. 20, had been inserted therein. The Birmingham and Derby Junction Railway commencing at Derby, communicates with the London and Birmingham Railway at Hampton-in-Aden. The Midland Counties Railway forms a communication between Derby and the London and Birmingham Railway at Rugby. The Birmingham and Derby Railway Act empowers that company to receive from passengers conveyed by the company's carriages tolls not exceeding a specified amount. A subsequent act for authorizing an alteration in the line of railway provides that the charges by the first act authorized to be made for the carriage of passengers, goods, or other matters or things, shall be at all times charged equally and after the same rate per ton per mile in respect of all passengers and goods of a like description, and conveyed or propelled by a like carriage or engine passing on the same portion of the line only, and under the same circumstances, and that no reduction or advance in any charge for conveyance by the company or for the use of any locomotive power *to be supplied [*254 by them, shall be made either directly or indirectly in favour of or against any particular company or person travelling upon or using the same portion of the railway under the same circumstances. After the opening of the Midland Counties Railway, the Birmingham and Derby Junction Railway Company charged passengers conveyed by their carriages from Derby to Hampton-in-Aden 8s. (which was within the limit allowed by the act), while they charged other passengers proceeding from Derby to Hampton-in-Aden, and thence to London, only after the rate of 2s. between Derby and Hampton-in-Aden. Upon an information filed, praying an injunction to restrain the imposition of an unequal charge between the termini at Derby and Hampton,—The Attorney-General v. The Birmingham and Derby Junction Railway Company, 2 Railw. Cases 124,—it was held by the Lord Chancellor that the clause above set forth was only meant to prevent the exercise of a monopoly to the prejudice of one passenger or carrier and in favour of another: and the injunction was refused, with costs. This court, in a case of *In re Jones and the Eastern*

(a) The points marked for argument on the part of the defendants were as follows:—

"1. That the rates fixed at the general meeting specially held on the 3d of July, 1860, were legal and proper, and that the defendants were and are justified in charging the plaintiffs for carriage in accordance with those rates:

"2. That the statute 8 & 9 Vict. c. 28 does not affect the defendants' rights in this respect:

"3. That the defendants were legally justified, under the circumstances stated in the case, in making and acting upon their agreement with the Ystalyfera Iron Company:

"4. That, even though the defendants were not justified in making the said agreement, the plaintiffs liability to pay the said rates, is not affected by it."

Counties Railway Company, 3 C. B. N. S. 718 (E. C. L. R. vol. 91), refused to grant a rule for an injunction against the Eastern Counties Railway Company, under the 17 & 18 Vict. c. 31, to compel them to issue season tickets between Colchester and London on the same terms as they issued them between Harwich and London,—upon a suggestion that the granting the latter (the distance being considerably greater) at a much lower rate than the former, was an undue and unreasonable preference of the inhabitants of Harwich over those of Colchester. The company are not bound to divide their canal into districts. As to the agreement with the Ystalyfera Iron Company, there clearly is nothing illegal in that. None of the traffic of that *255] company is carried *merely and solely over the same measured portion of the canal as that passed over by the plaintiffs' coals; and at the place where the company's traffic is brought on the canal, there is active competition with a railway company. Further, the defendants have the advantage of a guaranteed minimum of tolls to be paid by the company. This brings the case within *Re Nicholson and The Great Western Railway Company*, 5 C. B. N. S. 366 (E. C. L. R. vol. 94), where it was held that it is competent to a railway company to enter into special agreements whereby advantages may be secured to individuals in the carriage of goods upon the railway, where it is made clearly to appear, that, in entering into such agreements, the company have only the interests of the proprietors and the legitimate increase of the profits of the railway in view, and the consideration given to the company in return for the advantages afforded by them be adequate, and the company are willing to afford the same facilities to all others upon the same terms. Nor is the 2d section of the 17 & 18 Vict. c. 31 contravened by a railway company carrying at a lower rate, in consideration of a guarantee of large quantities and full train loads at regular periods, provided the real object of the company be to obtain thereby a greater remunerative profit by the diminished cost of carriage, although the effect may be to exclude from the lower rate those persons who cannot give such a guarantee. Upon these authorities, and upon the reason of the thing, it is submitted that the defendants have been guilty of no violation of either of the acts.

Welsby, in reply.—It will be impossible to carry out that principle of equality of charge which it was the object of the 2d section of the 8 & 9 Vict. c. 28 to secure, if the canal company are permitted to *256] vary the *charges for traversing any undefined distance along their canal as they have done here.

ERLE. C. J.—I am of opinion that the defendants are entitled to judgment. By the 67th section of the special act, 34 G. 3, c. cix., and the 2d section of the general act, 8 & 9 Vict. c. 28, the defendants are bound to charge tolls equally to all persons and after the same rate per mile or per ton per mile, in respect of all boats, &c., and all goods, passing along or using the same portion of the canal, &c. One complaint urged on the part of the plaintiffs, is, that they are charged 1½d. per ton per mile for the carriage of their coals on the canal a distance of 4½ miles, whereas other persons, viz., the Ystalyfera Iron Company, whose coals are carried along the canal for distances varying from 3½ miles to 10½ miles, are charged only ¾d.

per ton per mile. It seems to me that the contract with the Ystalyfera Iron Company falls exactly within the principle which has been laid down as to railway companies by many cases in this court, where it has been held that the company is guilty of no violation of the Railway Traffic Act, 1854, in carrying large guaranteed quantities of any description of goods for long distances and in full train loads at a lower rate than they will carry smaller quantities for less distances and without such guarantee. I see nothing unreasonable in such an arrangement. If a difference of charge is to be made, the line must be drawn somewhere. I am of opinion that the tariff is valid, and that the canal company were fully warranted in making the agreement they did with the Ystalyfera Iron Company.

WILLES, J.—I am of the same opinion, and for the same reasons.

BYLES, J.—I am of the same opinion. It seems to *me [*257 that the Railways Clauses Consolidation Act, 1845, which is recited in the 8 & 9 Vict. c. 28, and the Railway Traffic Act, 1854, are in *pari materia* with this act, and that it ought to receive substantially the same construction. The proviso in s. 2 is not absolute: it is that the tolls shall at all times be charged equally to all persons, and after the same rate, whether per mile or per ton per mile or otherwise, in respect of all boats, &c., and upon all goods, &c., conveyed in a like boat, &c., passing along or using the same portion of the canal “under the like circumstances.” Among the circumstances is the circumstance of the goods coming a longer distance on the canal. The principle adverted to by my Lord has been laid down and acted upon in a great number of cases in this court, the most recent of which is *In re Oxlade and the North Eastern Railway Company*, 15 C. B. N. S. 680 (E. C. L. R. vol. 109). The same principle was acted upon in the cases of *In re Jones and The Eastern Counties Railway Company*, 3 C. B. N. S. 718 (E. C. L. R. vol. 91), and *In re Nicholson and The Great Western Railway Company*, 5 C. B. N. S. 366 (E. C. L. R. vol. 94). The coals of the plaintiffs were not carried here under “the like circumstances” with those carried for the other parties.

KEATING, J., concurred.

Judgment for the defendants.

*ROBERT CARDWELL TOPPING and Another, Appellants; WILLIAM KEYSELL, Respondent. April 25. [*258

1. A trader, by a bill of sale dated the 24th of April 1860,—reciting that he was indebted to M. in the sum of 98*l.* for goods already delivered, and that he was desirous of obtaining a further supply to the extent of 82*l.*, which M. had declined to furnish without security,—assigned to M. all his household furniture, stock-in-trade, and effects for securing the 180*l.* and any further advances which M. might make to him,—with a proviso for redemption on payment, and a power to M. to seize and sell if the money should not be paid on demand. No further advance beyond the 98*l.* either in money or goods was made by M. At the time of the execution of this deed, the trader was indebted to several other creditors in sums sufficient to constitute good petitioning-creditors' debts:—Held, that the execution of the deed was an act of bankruptcy.

2. Three days after the date of the bill of sale, K., another creditor, applied to the trader for payment of his debt, and by pressure obtained from him goods to the value of 39*l.* 9*s.*, being

part of those comprised in M.'s bill of sale,—having notice at the time that the whole had been already assigned to M.

On the 7th of May, one W., to whom the trader owed 74*l.* at the time he gave the bill of sale to M., petitioned for an adjudication of bankruptcy against him. A meeting of the creditors took place, and, M. having consented to give up the proceeds of the goods which he had sold under the bill of sale, it was agreed that the trader should execute a deed of assignment for the benefit of all his creditors under the Bankruptcy Act, 1861, which was accordingly done, and the appellants were appointed trustees, and the deed duly registered:—

Held, that the title of the trustees under the deed of assignment by virtue of the 197th section related back to the execution of the bill of sale, and so overrode the transaction of the 27th of April, and consequently that they were entitled to recover from K. the value of the goods which he had obtained after notice of the act of bankruptcy.

THIS was an action brought in the Staffordshire county-court to recover the sum of 50*l.*,—first, “for that the defendant, on the 27th of April, 1863, possessed himself of certain goods belonging to the plaintiffs as trustees and assignees of the estate of William Knight, by virtue of a deed of assignment duly executed, registered, and completed pursuant to the Bankruptcy Act, 1861, namely, certain hams, bacon, cheese, and butter, specified in certain memoranda or invoices then delivered to him by the said William Knight, and which goods the defendant had converted and disposed of to his own use,”—secondly, “for that the said William Knight did, on the 27th of April, 1863 (having previously thereto committed an act of bankruptcy) give and deliver to the defendant certain goods, namely, certain hams, bacon, cheese, and butter, specified in certain memoranda or invoices then delivered by the said William Knight to the defendant, in order to give, and did thereby in fact give, to the defendant a *259] fraudulent preference over the other *creditors of the said William Knight,—the defendant having had notice of the said act of bankruptcy before the said goods were so delivered to him as aforesaid.”

The plaintiffs brought this action by virtue of the provisions of the Bankruptcy Act, 1861, as trustees and assignees under a deed of assignment of all the estate and effects of the said William Knight, dated the 16th of May, 1863, duly executed by the said William Knight, and executed or assented to in writing by the requisite majority of creditors, and registered on the 1st of June, 1863, by the chief registrar of the court of bankruptcy, gazetted, and otherwise perfected according to the provisions of the Bankruptcy Act, 1861.

The plaint was heard on the 21st of November, 1863, before the judge of the Staffordshire county-court, and a jury, when the following facts were proved:—

William Knight, the debtor, of whose estate the plaintiffs were trustees and assignees, was for some time previous to the 28th of April, 1863, a retail provision-dealer residing and carrying on his business at a shop in High Street, Walsall; and the defendant was a wholesale provision-dealer residing at Wolverhampton. On the 24th of April, 1863, Knight was in respect of goods previously supplied to him indebted as follows, viz. to the defendant in the sum of 42*l.*, to a Mr. May, provision-dealer, Dudley, in the sum of 98*l.* 3*s.*, and to the whole of his creditors in the aggregate sum of 398*l.*

On the 24th of April, 1863, Knight asked May for other goods. May then asked for security; and Knight executed a bill of sale to him, of which the following is a copy:—

"This indenture, made the 24th of April, 1863, *between William Knight, of, &c., of the one part, and Daniel May, of, [*260 &c., of the other part: Whereas, the said William Knight is justly and truly indebted to the said Daniel May in the sum of 98*l.* 3*s.* for goods and provisions supplied at different times by the said Daniel May, as he the said William Knight doth hereby acknowledge; and, the said William Knight having applied to the said Daniel May for more goods to the amount of 81*l.* 17*s.* the said Daniel May hath declined to furnish the same, unless the said William Knight gives to him the security hereinafter contained, to secure the two several sums of 98*l.* 3*s.* and 81*l.* 17*s.*, making together the sum of 180*l.*, and also such sums of money as may from time to time be due from him to the said Daniel May on his current account, and which security the said William Knight hath agreed to give to the said Daniel May in manner as hereinafter appearing: and the said Daniel May hath consequently agreed to supply the said William Knight at once with goods to the amount of 81*l.* 17*s.* as aforesaid: Now this indenture witnesseth, that, in consideration of the premises, the said William Knight, for himself, his heirs, executors, and administrators, doth hereby covenant with the said Daniel May, that he the said William Knight, his heirs, executors, or administrators, will immediately upon demand thereof in writing signed by or on behalf of the said Daniel May, his executors, administrators, or assigns, being delivered to him or them, or left at his or their last known place of abode in England, pay to the said Daniel May the sum of 180*l.*, or such sum as may at the time of such demand be owing from the said William Knight to the said Daniel May on the running balance of account between the said parties: And this indenture further witnesseth, that, for the considerations aforesaid, the said William Knight doth *hereby [*261 grant and assign unto the said Daniel May and his heirs all the household furniture, stock in trade, goods, effects, and things of him the said William Knight, now being in and about and upon the premises occupied by him the said William Knight, and situate in High Street, Walsall, aforesaid; and all the estate and interest of him the said William Knight therein or thereto, to hold, receive, and take the premises hereby granted and assured unto the said Daniel May, his executors, administrators, and assigns; and, for the more effectually securing the said sum of 180*l.* and the amount owing from time to time on such running balance of account as aforesaid, the said William Knight doth by these presents appoint the said Daniel May, his executors and administrators, the true and lawful attorneys of him the said William Knight in his or their name or names to sign, seal, and deliver, or make any assignment or delivery of any goods, chattels, and effects not passing by the effect of these presents, and which the said William Knight shall before the satisfaction of this security become entitled to or enabled to appoint, bind, or effect, either to the said Daniel May, his executors, administrators, or assigns, or to a purchaser or purchasers, or otherwise; and also to sue for, release, and give discharges for all or any of the goods, chattels, effects, and premises, and to do such other acts as the said attorneys may deem expedient to be done for the purposes of these presents,—he the said William Knight hereby ratifying and confirming, and agreeing to

to a question by the judge, he said,—“If I had not been asked for the money, I should not have given the defendant the goods.”

On the 28th of April, 1863, May demanded payment of the debt due to him, viz. 98*l.* 3*s.*, took possession under the bill of sale, and sold on the 1st of May, 1863. As soon as possession was taken, the shop was closed. May under his bill of sale sold all the effects and property of Knight, except a little furniture, which he did not consider worth selling, and realized, after paying costs of possession and sale, 61*l.* 10*s.*

On the 7th of May, Edwin Whitworth, one of Knight's creditors (his debt being 74*l.* 5*s.* 11*d.*) filed a petition for adjudication of bankruptcy against Knight in the Birmingham district court of Bankruptcy; and May was summoned to produce the bill of sale and give evidence on the 11th of May, the day of adjudication. On that day May attended; and, on the bill of sale being produced, the adjudication was adjourned to the 18th of May, in order that the creditors *266] might *all be communicated with by Mr. Whitworth, and informed that to avoid the costs of bankruptcy Mr. May had agreed to give up the proceeds of the bill of sale for the benefit of the creditors.

On the 16th of May, a majority in number representing three fourths in value of the creditors of Knight whose debts respectively amounted to 10*l.* and upwards, desired that a deed of assignment should be executed by Knight to the plaintiffs of all his estate and effects (being the proceeds of the bill of sale and the furniture), in trust for the benefit of all his creditors, in like manner as if he had been adjudicated bankrupt, and in writing assented to the said assignment, which thereupon was on that day executed by Knight; and in consequence thereof the proceedings in the Bankruptcy court were discontinued.

On the 1st of June, 1863, this deed of assignment was registered with the chief registrar in bankruptcy, pursuant to the 192d section of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), and, all the requirements of that act in that behalf having been complied with, the plaintiffs, as trustees under that deed, thereupon became possessed of the estate and effects of Knight, with all the like powers, rights, and privileges as if he had on the 16th of May, 1863, been adjudged a bankrupt, and the plaintiffs had under his bankruptcy been appointed assignees of his estate and effects.

The goods which were on the 27th of April, 1863, delivered to the defendant by Knight were demanded from the defendant by the plaintiffs as part of the estate belonging to them, as trustees and assignees as aforesaid. The defendant refused to return them, alleging that he had purchased them, and that it was a *bonâ fide* transaction.

At the trial, the plaintiffs contended that the bill of sale was an act *267] of bankruptcy, that the statement *made by Knight to the defendant on the 27th of April, 1863, was notice to the defendant of an act of bankruptcy having been committed by Knight, that the goods were given to the defendant after notice of that act of bankruptcy, and that the plaintiffs having, by virtue of the deed of assignment and the Bankruptcy Act, 1861, acquired the rights of assignees in bankruptcy over the estate of Knight on the 1st of June, 1863, the giving of the goods to the defendant was under the bankrupt law an

invalid transaction, and they were entitled to recover from the defendant the value of the goods in question; and also that the delivery of the goods to the defendant was under the circumstances made fraudulently and in contemplation of bankruptcy, Knight being then in a situation in which no prudent man could expect any other result than bankruptcy, that it was a fraudulent preference of the defendant by Knight, and that it was a fraudulent disposition by Knight of his goods with intent to defeat and delay his creditors.

The defendant objected to the plaintiffs' right to recover in this action, on the ground that the bill of sale was not an act of bankruptcy, inasmuch as it was not an absolute assignment, but only by way of mortgage, on which no proceedings could be had unless and until May demanded payment of the sum thereby secured; and that the statement made by Knight to the defendant on the 27th of April, 1863, of his having executed a bill of sale of all that was there, was not a notice of an act of bankruptcy; and also that the giving of the goods by Knight to the defendant was not a fraudulent preference, inasmuch as it had not been made voluntarily, but in consequence of the defendant's request, and not in contemplation of bankruptcy.

The judge decided that the bill of sale was only *a conditional bill of sale*, and was not in itself an act of bankruptcy; [*268 and that the statement made by Knight was not in law notice to the defendant of an act of bankruptcy having been committed by Knight: and he directed the jury, that, if Knight did not give the goods voluntarily, but was coaxed out of them by the promises of the defendant, or if he did not then contemplate bankruptcy, the giving was not fraudulent. He also directed them that the bill of sale was not an act of bankruptcy.

The plaintiffs objected to the judge's direction to the jury, on the ground that he ought to direct them that the insolvent state of Knight at the time he gave the bill of sale, and at the time he gave the goods to the defendant, was in law evidence that he contemplated bankruptcy: and that the giving of the goods by him to the defendant because of his promises was under the circumstances evidence of a fraudulent delivery with intent to give a preference to the defendant, or to defeat or delay creditors.

The judge then submitted to the jury the following questions,—
“Was the bill of sale an act of bankruptcy, and was the notice which was given to the defendant by Knight of the bill of sale notice of an act of bankruptcy by Knight?”

“Do you think Knight gave the goods to the defendant voluntarily, or was he coaxed out of them? and did he at that time contemplate bankruptcy?”

The jury found that the bill of sale was not an act of bankruptcy, and that the notice referred to was not notice of an act of bankruptcy. They also said “Mr. Knight did not give the goods to the defendant voluntarily, but he was coaxed out of them, and he did not then contemplate bankruptcy.” The jury also stated that they considered that the sale of Knight's goods by May under the bill of sale caused Knight's bankruptcy.

*The judge thereupon directed a verdict to be entered for the defendant; and, by consent, and to save the costs of a new [*269

trial, the jury were asked to find what damages the plaintiffs would be entitled to if the verdict ought to be entered for them; and the jury found that those damages would be 39*l.* 9*s.*

The questions for the opinion of the court were,—first, was the bill of sale an act of bankruptcy? and, if so, was the notice thereof which was given to the defendant by Knight a sufficient notice of an act of bankruptcy having been committed by Knight? and ought the jury to have been so directed?—secondly, were the jury rightly directed, when they were directed to find whether Knight contemplated bankruptcy at the time of the giving of the goods to the defendant, and whether he gave the goods voluntarily or was coaxed out of them, without being directed that the insolvent state of Knight and the giving of the bill of sale when so insolvent were in law proof that bankruptcy was contemplated by him, and also without being directed, that, as the goods were given by Knight to the defendant because of the before-mentioned promises, the facts proved were under the circumstances evidence of a fraudulent transaction made with intent to give a preference to the defendant or to defeat or delay creditors?

Macnamara, for the appellants.(a)—The bill of sale from Knight to May was clearly an act of bankruptcy, *and the defendant had *270] notice of it at the time he received the goods in question. [BYLES, J.—The date of Whitworth's debt nowhere appears.] It sufficiently appears by inference that it existed at the time the bill of sale was given. [ERLE, C. J.—Why should not a debtor satisfy his debt?] The defendant had notice that all the property had been assigned by bill of sale to May. [ERLE, C. J.—What of that, if no bankruptcy followed?] In *Bowes v. Foster*, 2 Hurlst. & N. 779, the plaintiff, being in difficulties, and fearing that some of his creditors would issue execution against his goods, agreed with the defendant, who was also a creditor, that there should be a pretended sale of them to him. For this purpose, an invoice was made out, and a receipt given to the defendant for a sum therein stated to be the purchase-money, and possession of the goods was delivered to the defendant. Afterwards the defendant sold the goods as his own, whereupon the plaintiff brought trover: and it was held that no property in the goods passed to the defendant, and that the plaintiff was not precluded *271] from showing that no payment was in fact made, and that the *transaction was not a real, but a pretended sale. [ERLE, C.

(a) The points marked for argument on the part of the appellants were as follows:—

"1. That the bill of sale between Knight and May, dated the 24th of April, 1863, was an act of bankruptcy:

"2. That, on the 27th of April, 1863, the respondent had notice from Knight of the said act of bankruptcy:

"3. That the goods in question in this action were delivered by Knight to the respondent by way of fraudulent preference:

"4. That the delivery and transfer of the said goods by Knight to the respondent was under the circumstances set forth in the case fraudulent and void as against the creditors of Knight, or those who represent them:

"5. That such fraudulent transfer was in itself an act of bankruptcy:

"6. That the judge of the county-court should have directed the jury according to the above propositions:

"7. That, at all events, he should have directed them that there was evidence of a fraudulent transaction between Knight and the respondent, or on the part of the respondent, within the meaning of the bankrupt laws, and that, if they found the same to have existed, they would be justified in returning a verdict for the appellants."

J.—The jury found there that the transaction was a mere colourable one, for the purpose of protecting the goods against any creditor who might issue execution. Here, it was a real transaction so far as the parties intended it: the goods were given and received as payment.] The object was to give a preference. [BYLES, J.—The assignment to May was an assignment of the whole of Knight's property. An assignment of the whole of a trader's property for a by-gone debt, there being at the time a sufficient debt to found a petition in bankruptcy, is an act of bankruptcy.] It was so held in *Graham v. Chapman*, 12 C. B. 85 (E. C. L. R. vol. 74), and *Lacon v. Liffen*, 32 Law J. Ch. 315. An agreement to deliver further goods, does not take the case out of the rule: especially where power is given to seize those very goods. As to notice of the assignment, it is clear that the defendant was informed that a bill of sale had been given to May: and it is manifest that Knight contemplated and expected bankruptcy or insolvency.

Griffiths, for the respondent. (a)—It must be conceded that the execution of the bill of sale to May was an *act of bankruptcy. [*272 The judge of the county-court erred in supposing that because the assignment was conditional it was not an act of bankruptcy. The question is whether the defendant had notice of it. Whether notice or not, was a question for the jury, and they found that there was not: and this court has no power to review their decision. [ERLE, C. J.—If the defendant heard what was said, he had notice of an act of bankruptcy. The only question for the jury, was, *did he [*273 hear it?] If the appellants were dissatisfied with the verdict, they might have applied for a new trial. [ERLE, C. J.—The judge took it upon himself to decide that the execution of the bill of sale

(a) The points marked for argument on the part of the respondent were as follows:—

- "1. That the bill of sale was not under the circumstances stated an act of bankruptcy:
- "2. That, if there was evidence upon which the jury might have found the bill of sale to be an act of bankruptcy, they were properly directed by the judge to determine that question:
- "3. That the question whether the bill of sale was under the circumstances an act of bankruptcy, was a question of fact for the jury, which they determined:
- "4. That the question of notice of an act of bankruptcy was one of fact for the jury, and they were properly directed by the learned judge upon it:
- "5. That, whether a fraudulent preference had been made, was a question of fact for the jury:
- "6. That the jury were properly directed as to the question of fraudulent preference:
- "7. That the right of the plaintiffs is based upon an assignment by Knight of the 16th of May, and they are only entitled to such goods as could properly pass by that assignment, on that day; and he could not assign those sought to be recovered in this action:
- "8. That, as the transaction between Knight and the defendant occurred long before the execution of that deed, and was binding between Knight and the defendant, the plaintiffs have no power to avoid it:
- "9. That, assuming in law, in case of a bankruptcy, the bill of sale to be an act of bankruptcy, and the transaction between Knight and the defendant to be a fraudulent preference, still, as the plaintiffs are not assignees under the bankruptcy, and the proceedings in bankruptcy are suspended under the 110th section of the Bankruptcy Act, 1861, the plaintiffs have no right by virtue of the assignment and its registration to avoid the transaction between Knight and the defendant, and to recover from the defendant the value of the goods which were delivered to him by Knight by virtue of that transaction:
- "10. That the title of the plaintiffs can have no relation back to any act of bankruptcy prior to the assignment to them:
- "11. That there was no misdirection in point of law:
- "12. That the plaintiffs have no right or title to recover in this action:
- "13. That the defendant was in law and in fact entitled to the verdict."

was not in point of law an act of bankruptcy: we must take it all together.] In any view, the defendant is entitled to the verdict. The plaintiffs claim under an assignment under the bankruptcy. They are simply trustees under a deed of assignment, with such powers as the statute (24 & 25 Vict. c. 134) gives them as such. Their title, if any, is under the assignment to them long after the defendant's title accrued. [BYLES, J.—Under the Bankruptcy Act, 1861, the trustees under a deed have all the rights and powers of assignees in bankruptcy.] The 197th section enacts, that, “from and after the registration of every such deed or instrument in manner aforesaid (s. 194), the debtor and creditors and trustees parties to such deed, or who have assented thereto or are bound thereby, shall in all matters relating to the estate and effects of such debtor be subject to the jurisdiction of the court of bankruptcy, and shall respectively have the benefit of and be liable to all the provisions of this act, in the same or like manner as if the debtor had been adjudged a bankrupt, and the creditors had proved, and the trustees had been appointed creditors' assignees under such bankruptcy; and the existing or future trustees of any such deed or instrument, and the creditors under the same, shall, as between themselves respectively, and as between themselves and the debtor and against third persons, have the same powers, rights, and remedies with respect to the debtor and his estate and effects, and the collection and recovery of the same, as are possessed or may be used or exercised by assignees or creditors with respect to *274] the bankrupt, or his acts, estate, and effects, in “bankruptcy.” That never was intended to give the trustees power to set aside prior transactions. The section applies to composition deeds, to letters of license, to assignments like this, and to inspection deeds. The bankruptcy is annulled: and the case is the same as if there had been no bankruptcy. This is a common trust deed registered. The appellants can only put this as a case of fraudulent preference. Their rights under the deed of the 16th of May, 1863, have no relation back, but have their inception from the deed. In *Paull v. Best*, 3 Best & Smith 537, on the 27th of March, 1861, J. P. committed an act of bankruptcy under the 12 & 13 Vict. c. 106, s. 67, by making a fraudulent conveyance of all his goods and chattels to A. B., his landlord, but no attempt was made by any creditor to obtain an adjudication upon it, nor did it appear that there was any creditor who could have done so. On the 11th of October, the day from and after which the Bankruptcy Act, 1861, came into operation, A. B. made a distress on the goods of J. P. for four years' rent; and, on the 17th of October, J. P., who was not a trader, was adjudicated bankrupt on his own petition under ss. 86, 87 of the last-mentioned act, and assignees were appointed. It was held that the title of the assignees could not relate back to the act of bankruptcy in the preceding March, and consequently that the 129th section of the first-mentioned statute (which makes a distress unavailing for more than a year's rent) did not apply. In *Whitmore v. Dowling*, 2 Fost. & Fin. 134, Martin, B., says “there is no relation back, where a trader has been made bankrupt on his own petition,”—referring to *Monk v. Sharp*, 2 Hurlst. & N. 540. In that case, the plaintiffs, who were traders, on the 26th of June, petitioned the court of bankruptcy for protection, under the 211th section

of the 12 & 13 Vict. c. 106. They filed an account of *debts, [*275 and made a proposal according to s. 214. At an adjourned meeting on the 6th of August, the plaintiffs did not attend, and neither the proposal nor any modification of it was accepted, whereupon the meeting was adjourned to the public court, and the plaintiffs were adjudged bankrupt under s. 223. The adjudication was not founded on the petition of a creditor, nor was the plaintiff's petition dismissed. It was held,—first, that the filing of the petition for arrangement was not an act of bankruptcy, that petition never having been actually dismissed, and no petition for an adjudication of bankruptcy having been filed within two months, in pursuance of s. 76,—secondly, that, where a trader is adjudicated bankrupt under the 223d section, without the filing of a petition by a creditor, the bankruptcy has no relation back to any act done by the bankrupt prior to adjudication. The like was held in *Nicholson v. Gooch*, 5 Ellis & B. 999.

Macnamara, in reply.—Upon appeals from the county-court, the court will not entertain any objection which was not urged in the court below : per Patteson, J., in *Watson v. The Ambergate, Nottingham, and Boston Railway Company*, 15 Jurist 448; *Yorke v. Smith*, 21 Law J., Q. B. 53. [WILLES, J.—Is the *respondent* bound so strictly?] The rule is laid down generally. [*Griffiths* submitted, that, having got the verdict, he was entitled to retain it upon any ground which would incapacitate the plaintiffs from recovering: and he referred to *Stancliffe v. Clark*, 7 Exch. 439.] The position of trustees under these deeds is this,—they take all the property of the bankrupt, and all the rights of assignees in bankruptcy, unless limited by the terms of the deed. The words of the 197th section are express,—“From and after the registration of every such deed or instrument in manner aforesaid, *the debtor, and creditors, and trustees, parties to such deed, or who have assented thereto or are bound [*276 thereby, shall in all matters relating to the estate and effects of such debtor be subject to the jurisdiction of the court of bankruptcy, and shall respectively have the benefit of and be liable to all the provisions of this act in the same or like manner as if the debtor had been adjudged a bankrupt, and the creditors had proved, and the trustees had been appointed creditors' assignees under such bankruptcy; and the existing or future trustees of any such deed or instrument, and the creditors under the same, shall, as between themselves respectively, and as between themselves and the debtor and against third persons, have the same powers, rights, and remedies with respect to the debtor and his estate and effects, and the collection and recovery of the same, as are possessed or may be used or exercised by assignees or creditors with respect to the bankrupt, or his acts, estate, and effects in bankruptcy.” If this be not so, the trustees will be unable to question fraudulent transactions between the bankrupt and a favoured creditor. In *Ex parte Morgan, In re Woodhouse*, 32 Law J. Bankruptcy 15, 20, Lord Westbury, C., says that “the 197th section causes the state of things under a trust deed to be precisely the same as if there had been a bankruptcy instead of a deed of composition.” This is a change from bankruptcy to arrangement under the 185th and subsequent sections, and is in all respects to be dealt with as an adjudication of bankruptcy. Parke, B., in delivering the

judgment of the court of error in *Stevenson v. Newnham*, 13 C. B. 285, 299, says: "The fraudulent delivery of goods, or the causing them to be taken in execution with intent to defeat or delay creditors, is an act of bankruptcy: and if, in this case, the assignees under this *277] fiat could have resorted to such an act of *bankruptcy, we should have thought their title would have related back to the delivery of the goods, or the fraudulent execution itself, as an act of bankruptcy; and the property in the goods would thereby have been vested in the assignees from that moment; and so the plaintiff would not have been entitled to sue for the sale of, or damage to, these goods, though he might still, perhaps, have been able to sue for a part of his alleged cause of action,—the loss of the temporary possession of the excess more than ought to have been taken as a distress. And, if the fiat had been issued on the petition of any of those creditors to whom the bankrupt was indebted at the time of the transfer of the goods to the plaintiff, in a sum sufficient to make them good petitioners, the assignees under that fiat would have had a title to the goods, by that very transfer." And in a subsequent part of the judgment, the learned judge says,—p. 300,—"It may be collected from the bill of exceptions in this case, that the adjudication of bankruptcy proceeded on the bankrupt's own application, not on that of creditors to the amount sufficient to constitute a petitioning-creditor's debt, who might have obtained the adjudication. It seems to us, that, in such a case, the act of bankruptcy on which the petition is to proceed, is, the declaration of insolvency; and that there can be no relation back further than to that act. It might, perhaps, have been otherwise, if the adjudication had taken place on the application of creditors, though the fiat had issued on the petition of the bankrupt; for, then, as in the case of an ordinary commission or fiat, there may perhaps be a relation back to any act of bankruptcy which can be proved subsequent to the petitioning-creditor's debt. The provision at the close of the section, that the proceedings may be prosecuted and carried on in like manner as if the fiat had *been issued and adjudicated upon on the petition of *the creditor*, was merely added for the purpose of providing that all the meetings, examinations, &c., should take place in the same way as under ordinary fiats or commissions; this section being the first by which a fiat can issue on the bankrupt's own petition. It would appear from the report of a case in 1 De Gex's Bankruptcy Cases 528,—*Ex parte Norton*,—that Lord Justice Knight Bruce, then Vice-Chancellor, expressed an inclination of opinion that fraudulent preferences might be impeached under a fiat on a bankrupt's own petition, if there was a sufficient petitioning-creditor's debt at the time of such fraudulent preference." And see the opinions of Blackburn, J., and Wightman, J., in *Young v. Billiter*, 8 House of Lords Cases 692, 703. It is conceded here that there was an act of bankruptcy, and notice thereof to the defendant, before the delivery of the goods to him, and that, if the plaintiffs had been assignees under a fiat, they might have avoided the transaction. Under the Insolvent Debtors Acts there was no relation; and yet, in *Doe d. Grimsby v. Ball*, 11 M. & W. 581, it was held that a conveyance of lands which is fraudulent and void against the creditors of the conveying party within the 13 Eliz. c. 5, is void also as against his

assignee on his insolvency, who represents the creditors; and that the assignee may recover back the lands in ejectment. "I think," says Parke, B., "that the assignee of an insolvent debtor represents the creditors for all purposes; and, if any fraud exists in the transaction to which the insolvent was a party, that the assignee may take advantage of it. A deed which is void as against creditors, is also void as against those who represent creditors." To the same effect is *Butcher v. Harrison*, 4 B. & Ad. 129 (E. C. L. R. vol. 24), 1 M. & M. 677. [ERLE, C. J.—Unless there is a relation back, there is nothing to impeach the *transaction. The contention on the part [*279 of the defendant is, that the title of the trustees under the deed of the 16th of May has its inception from the deed. If the transaction sought to be impeached was invalid, the trustees might, no doubt, take advantage of its invalidity. But, if it be impeachable only under the provisions of the bankrupt laws, and there is no relation, they cannot. It is perfectly competent to a debtor at any time to pay his creditor, whether in money or in goods. But, with reference to the bankrupt laws, after an act of bankruptcy, with notice, it is wrong to pay one creditor in preference to the rest.] This was a fraudulent preference in contemplation of bankruptcy. Any grant made by a trader after an act of bankruptcy and notice, may be avoided by any one who represents the creditors. All these goods had been absolutely assigned to May prior to their delivery to the defendant. No property therefore passed by such delivery. And the plaintiffs represent May as well as Knight and the rest of the creditors.

ERLE, C. J.—I am of opinion that a verdict should be entered for the appellants in this case for 39*l.* 9*s.*, and with costs. The action was brought by the plaintiffs as trustees and assignees under a deed which in reality has become equivalent to a bankruptcy, under the 197th section of the Bankruptcy Act, 1861. One point of contention was, whether the bill of sale executed by Knight in favour of May on the 24th of April, 1863, whereby the former, in consideration of a past debt, assigned to the latter all his property present and future, without any present advance of money, constituted an act of bankruptcy. That such a transaction is an act of bankruptcy, has repeatedly been decided; and it is not the less an act of bankruptcy because it is in the form of a mortgage: the entire *and absolute [*280 right to the property vested in May. The next question which was discussed in the court below, was, whether the defendant had notice of that act of bankruptcy when the goods now sought to be recovered were delivered to him. He called upon Knight for payment of a debt. Knight informed him that he had given a bill of sale of all his goods to May: but, being pressed by the defendant for money or goods, Knight delivered to him goods to the value of 39*l.* 9*s.* The learned judge of the county-court intimated an opinion that this did not amount to notice of an act of bankruptcy. I am, however, clearly of opinion, that, if the defendant knew of the bill of sale, he had notice of an act of bankruptcy. But Mr. Griffiths, having got the verdict, insists that he is entitled to support it upon any ground which will in law incapacitate the plaintiffs from recovering; and accordingly he has raised a very important question, viz. whether the trustees under a deed of this description can take advantage of the relation so as to

overreach the transaction of the 27th of April, 1863. Now, it is clear that there was at this time a good petitioning-creditor's debt, an act of bankruptcy, and notice thereof: assignees in bankruptcy might, therefore, have set aside the transaction. But Mr. Griffiths says that trustees under a deed of this sort stand in *pari jure* with the assignees of a bankrupt upon his own petition, and that in such a case there is no relation back to any prior act of bankruptcy. Several cases have been pressed upon us where this has been held. But I am of opinion that the Bankruptcy Act, 1861, has a much wider relation than is suggested. That statute contemplates a variety of deeds of arrangement between bankrupts and their creditors, under some of which little or nothing passes to the trustees. I decide this case upon the
*281] narrow ground *that here is an assignment to the plaintiffs of all the property of the debtor, arising out of a petition for an adjudication filed by a creditor, and a subsequent meeting of the general body of creditors under the provisions of the statute, and an arrangement come to for the purpose of winding up and distributing his estate as in bankruptcy, without incurring the expense of the ordinary machinery for that purpose. The language of the statute is to a clear extent unlimited, to give the trustees under such a deed as this all the rights which assignees in bankruptcy would have had. The 197th section expressly provides, that, from and after the registration of every such deed [s. 192] in manner aforesaid [s. 194], the debtor, and creditors, and trustees, parties to such deed, or who have assented thereto, or are bound thereby, shall in all matters relating to the estate and effects of such debtor be subject to the jurisdiction of the court of bankruptcy, and shall respectively have the benefit of and be liable to all the provisions of this act in the same or like manner as if the debtor had been adjudged a bankrupt, and the creditors had proved, and the trustees had been appointed creditors' assignees under such bankruptcy; and the existing or future trustees of any such deed or instrument, and the creditors under the same, shall, as between themselves respectively, and as between themselves and the debtor, and against third persons, have the same powers, rights, and remedies with respect to the debtor and his estate and effects, and the collection and recovery of the same, as are possessed or may be used or exercised by assignees or creditors with respect to the bankrupt, or his acts, estate, and effects in bankruptcy. The deed in question conveys to the trustees all the property of the debtor; and it is in accordance with its terms that the trustees are to
*282] have all the rights which would *have been vested in the assignees if the bankruptcy had proceeded. All these rights are given subject to the control of the court of bankruptcy. The judgment I am giving will enable the trustees to do what the common principles of justice require that they should do, viz. divide the debtor's estate among all his creditors. I see no reason why their rights should be limited to the date of the deed. For these reasons, I am of opinion that the appellants are entitled to judgment.

WILLES, J.—I am of the same opinion. I think it would be very extraordinary if the trustees under this deed of assignment could not recover back the value of the goods which the respondent obtained from Knight on the 27th of April, in the manner stated in the case.

It seems, that, on the 24th of April, Knight, being indebted to May in the sum of 98*l.* 3*s.*, executed an assignment to him by way of bill of sale of the whole of his effects. This instrument seems to have been framed carefully for the purpose of making it appear to be a valid deed. It recites that Knight is indebted to May in the sum of 98*l.* 3*s.* for goods sold, and had applied to him for more goods, to the amount of 81*l.* 17*s.*, but that May had declined to furnish the same unless Knight would give him the security thereafter contained, to secure both sums, amounting to 180*l.*, and also such as might from time to time be due from him to May on his current account. Now, according to the decisions, if so much goods had been delivered, they might have been considered an exception so as to prevent its being an assignment without consideration, and to make it a valid deed, unless there were circumstances to render it invalid under the statute of Elizabeth. On the 28th of April, May (having made no advances to Knight either in money or goods at the *time of the execu- [*283 tion of the bill of sale or afterwards) demanded payment of his debt, took possession of all the property in Knight's shop, and sold it. I quite agree with Mr. Griffiths that this court cannot upon an appeal from a county-court, entertain a mere question of fact. But the court is bound to found its judgment upon a conclusion or inference of fact which any rational man would draw: and I think no rational man could conclude otherwise than that this was neither more nor less than an assignment of the whole of Knight's property, and an act of bankruptcy.^(a) Let us turn to what took place between the 24th and the 28th of April. On the 27th, the respondent called upon Knight to demand payment for goods he had supplied to him. Knight told him he could not pay him, and acknowledged that he had given May a bill of sale for 98*l.* odd which he owed him,—adding "It is on all there's here." There can be no doubt that that was a statement that Knight had given a bill of sale which amounted to an act of bankruptcy. The only qualifying word in the statement made to the respondent was the word "here:" but there is no suggestion that Knight possessed any goods or property anywhere else. The respondent, therefore, had at this time notice of an act of bankruptcy. That being so, a conversation follows between Knight and the respondent, in the course of which the respondent prevailed upon Knight, by a promise that he would be favourable to him when he should start again, to hand over to him the goods the value of which is now sought to be recovered. If the real object of the debtor was to prefer the particular creditor, the transaction clearly was within the law as to fraudulent preference. I am at a loss to see how language could more clearly point to a contemplation on the part of the debtor that his *affairs would be wound up. I am quite aware of the [*284 decision of the Court of Queen's Bench which corrected an impression that once prevailed, that it was enough if the trader contemplated a state of insolvency at the time of the transaction complained of. But I am of opinion that it is enough if the debtor is aware that his assets will be compulsorily distributed under the bankrupt laws. These proceedings under deeds of composition or arrangement are quite under the control of the court of bankruptcy. How any

(a) See *Pennell v. Reynolds*, 11 C. B. N. S. 709 (E. C. L. R. vol. 103).

one could come to the conclusion that this man, at the time he parted with the control over the whole of his effects, did not contemplate bankruptcy, I am entirely at a loss to conceive. I come back now to the act of bankruptcy. The question is, whether under the 197th section of the Bankruptcy Act, 1861, the title of the trustees under a deed of this kind has relation back to the act of bankruptcy. Now, here must be introduced an additional fact, viz. that before the creditors had met and agreed to accept the composition offered, there had been a proceeding by Whitworth (on the 7th of May) for an adjudication of bankruptcy. Whitworth's debt must have been due on that day. The aggregate of Knight's liabilities is set out in the case, and it sufficiently appears that Whitworth's debt was in existence at the date of the bill of sale. Whitworth's petition was not proceeded with, because the creditors judged it expedient that the estate should be wound up under a deed. If Whitworth's petition had been proceeded with, and Knight had been adjudicated a bankrupt, and assignees appointed, unquestionably they might have set aside the transaction. That is conceded. The only question is, whether the trustees under the deed of arrangement stand in a different position in this respect from assignees in bankruptcy. It is impossible to read the provisions *285] of the Bankruptcy Act, 1861, without seeing that the strongest desire existed in the minds of its framers to encourage creditors to assent to trust deeds, and to give to the court of bankruptcy a jurisdiction over them which it did not possess before. This is obvious to those who are acquainted with the difficulties which existed in dealing with the clauses for that purpose in the act of 1849, and with the more extensive provisions contained in the existing Bankruptcy Act. One of those provisions, viz. the 197th section, has already been adverted to by my Lord. It is there enacted, that, "from and after the registration of every such deed or instrument in manner aforesaid, the debtor and creditors and trustees parties to such deed, or who have assented thereto or are bound thereby, shall in all matters relating to the estate and effects of such debtor be *subject to the jurisdiction of the court of Bankruptcy*, and shall respectively *have the benefit of and be liable to all the provisions of this act in the same or like manner as if the debtor had been adjudged a bankrupt*, and the creditors had proved, and the trustees had been appointed creditors' assignees under such bankruptcy." That appears to me to be sufficient to show that the trustees must have the same power to set aside a fraudulent transaction with the debtor as the assignees would have had. It is necessary to turn to the statute to see the provisions with reference to the appointment of assignees and the vesting of the property in them. Formerly, the title of the assignees had relation back to any act of bankruptcy, which could be proved subsequent to the petitioning-creditor's debt. Now they may set aside all transactions and dealings with the bankrupt with notice of an act of bankruptcy. The exception in the case of a fiat issued upon the bankrupt's own petition, is founded upon the fact that the legislature have themselves taken the *286] filing of the petition as the act of bankruptcy in that case, and therefore the only one to which the title of the assignees can have relation: see *Stevenson v. Newnham*, 13 C. B. 285 (E. C. L. R. vol. 76). Expressing no opinion upon the former cases, but con-

fining myself to the circumstances of the case now before me, I am of opinion that the trustees have a right to the application of the enactments on which the relation depends in their favour. One point induced me to hesitate: but, upon reflection, it seems to me to present no real difficulty. Under the provisions contained in the 12 & 13 Vict. c. 106, it was necessary that the *whole* of the trader's property should pass by the assignment to the trustees. Under the provisions of the act of 1861, this is not necessary. Cases may be supposed which it might be difficult to deal with. But our decision on the present occasion steers clear of them. The words of s. 197, "so far as may be applicable" override the whole. Upon the whole, it appears to me very clearly that the plaintiffs, the trustees under this deed, are entitled as assignees to recover the value of the goods in question. They were obtained from Knight in fraud of the other creditors, after notice of an act of bankruptcy. The judgment of the county-court must be reversed, with costs.

BYLES, J.—I am of the same opinion. Although this case comes before us upon an appeal from a decision of a county court, it raises a question of the greatest importance, affecting the rights of a great many persons under deeds which are now becoming of almost daily occurrence. If the bankruptcy had proceeded, there can be no doubt that the assignees would have been entitled to recover the goods in question. The bill of sale of the 24th of April was an assignment of the whole of Knight's effects within the reach of the petitioning-creditor's debt, and within two months of the filing of the petition. When we come *to apply the facts to a case where there is no petitioning-creditor, the law seems to be clear: for, it has been [*287 decided in no less than four cases,—*Stevenson v. Newnham*, 13 C. B. 285 (E. C. L. R. vol. 76), in the Exchequer Chamber, *Nicholson v. Gooch*, 5 Ellis & B. 999 (E. C. L. R. vol. 85), in the Queen's Bench, *Monk v. Sharp*, 2 Hurlst. & N. 540, in the court of Exchequer, and the recent case of *Shrubsole v. Sussams*, in this court,(a)—that, where there is no petitioning-creditor's debt in existence at the time, a deed conveying all a trader's effects to an individual creditor, is an unimpeachable deed. But here was an existing petitioning-creditor's debt. It is true there was no bankruptcy. But still there was a petitioning-creditor: and the statute says that the assignee or trustee under a trust-deed shall have all the rights of all the creditors, including the petitioning-creditor. Upon this, therefore, as well as upon the other point mentioned by my Lord, I think we may safely hold that there is in *this case* a relation.

KEATING, J.—I am entirely of the same opinion. After the reasons given by the rest of the court, I will only make one observation upon the important point which has been raised. Looking at the comprehensive language of the 197th section of the 24 & 25 Vict. c. 134, which seems to have no limit, I should find it very difficult to say that that section would not reach a transaction like this, where there has been a petitioning-creditor and a petition, though the matter has not proceeded to an adjudication. I agree that there must be judgment for the appellants.

Judgment for the appellants, with costs.

(a) Post, p. 452.

***288] *CRAWSHAY BAILEY and Others, Appellants; HENRY BODENHAM, Respondent. May 2.**

1. On Wednesday May 6, A. received at Monmouth a check drawn upon M. & Co., bankers at Ross, about ten miles distant. On Friday the 8th he paid into his bankers at Monmouth, and they on the same day sent it by post to their London agents (the City Bank), to be passed through the country clearing-house there. The drawees' London agents were B. & Co. (whose names appeared in a printed memorandum at the foot of the check), but their account with them was closed on Thursday the 7th. The check being refused by B. & Co. at the clearing-house, the City Bank sent it by post on Saturday the 9th for payment to the drawees, who kept it until Friday the 15th, and then returned it to the City Bank, who received it on Saturday the 16th, and sent it by that day's post to their correspondents, the Monmouth Bank, who (receiving it on Sunday the 17th) sent notice of the dishonour by the post on Tuesday the 19th to the drawer, whom it reached on the 20th.

A run upon the bank of M. & Co. commenced on Monday the 11th, and on Wednesday the 13th, at noon, they finally stopped payment.

In an action in the county-court by the Monmouth Bank against the drawer, it was proved that the drawees sent cash through the post to country bankers, in payment of checks drawn upon them, as late as Monday the 11th, but did not honour any checks forwarded to them by London bankers after Thursday the 7th; that, if the check in question had been received by them by post from the City Bank on Friday the 8th, it would not have been paid; but that, if presented across the counter at any time before the final stoppage on Wednesday the 13th, it would have been paid.

The county-court judge having upon these facts nonsuited the plaintiffs,—this court, upon appeal, affirmed his decision; holding that the presentment was not in due time.

2. *Seemle*, also, that the notice of dishonour was too late.

3. Where a check is drawn upon a country banker,—*quære* whether sending it by post from London to the drawee, with a demand of payment, is a good presentment?

4. The mention of the names and address of the London agents in a memorandum at the foot of a country banker's check, does not make the check payable at the place so indicated.

THIS was an action brought by the appellants in the county-court of Herefordshire holden at Ross, to recover the amount of a check for 29l. 8s. drawn by the respondent on Wednesday, the 6th of May, 1864, on his bankers, Messrs. Morgan & Adams, of Ross, in the county of Hereford, payable to Mr. Noah Watkins or bearer, and given on the same day by the respondent to Mr. Watkins at his shop in Monmouth (a post-town ten miles from Ross), in discharge of a shop account. The trial took place on the 8th of August last, when judgment was reserved until the next court held for the district, on the 10th of October last, when the plaintiffs were nonsuited.

Upon an appeal against that decision, the facts were stated as follows:—

1. Noah Watkins kept the check from Wednesday the 6th until
*289] Friday the 8th of May, and on the *last-mentioned day paid it to the credit of his account at his bankers' (the plaintiffs), at Monmouth. The following is a copy of the check:—

“Herefordshire. Ross, May 6th, 1863.

“Joseph Morgan and Francis Hamp Adams,

“Ross and Archenfield Bank.

“Pay Mr. N. Watkins or bearer the sum of twenty-nine pounds eight shillings.

“£29 8 0

“H. BODENHAM.

“London agents, Messrs. Barclay, Bevan, Tritton & Co.”

2. The plaintiffs sent this check to the City Bank, their London agents, by the post of Friday the 8th of May, to be presented by them

to Messrs. Barclay & Co., the London agents of the Ross bank, through the country clearing-house.

3. Messrs. Morgan & Adams, however, had closed their account with Messrs. Barclay & Co. on Thursday the 7th of May; and the City Bank therefore sent this check by the post of Saturday the 9th of May to Messrs. Morgan & Adams, at Ross, where it arrived on the morning of Sunday the 10th of May.

4. Upon the next day, Monday, the 11th of May, there was a run on Messrs. Morgan & Adams; and this check was put aside by them until the following Friday, the 15th of May, when it was returned to the City Bank, dishonoured.

5. The City Bank received it on the 16th of May, and by the same day's post returned it to Messrs. Bailey & Co. (the appellants), who, having received it on Sunday the 17th of May, sent notice of dishonour by the post of Tuesday the 19th of May to the defendant, who received it on Wednesday, the 20th of May.

6. Messrs. Morgan & Adams continued their business transactions over the counter up to about noon *on Wednesday the 13th of May, when they finally stopped payment; and they have since [*290 been adjudicated bankrupts. They sent cash through the post to country bankers in payment of checks drawn upon them as late as by the post of Monday the 11th of May: but they did not honour any check forwarded to them by London bankers after Thursday the 7th: and it was proved, that, if this check had been received by Messrs. Morgan & Adams by post from the City Bank on Friday the 8th or Saturday the 9th of May, it would not have been paid.

7. It was also proved, that, if the check had been presented across the counter at any time before the final stoppage of the bank on Wednesday the 13th of May, or had been forwarded by post direct from Messrs. Bailey & Co. as late as Monday the 11th of May, it would have been paid; the defendant having a balance in his favour of 49*l.* 13*s.* 11*d.* from the time of drawing the check down to the stoppage of the bank.

8. No evidence was produced to prove that by the custom of bankers a presentment of a check by transmission through the post from the bankers who hold it to the bankers on whom it is drawn, is sufficient as against the drawer, or that there is a duty on the drawees, as the drawer's agents, upon the receipt of a check through the post in the manner above stated, to remit cash through the post to the transmitter, in payment of it.

9. The plaintiffs were nonsuited, on the ground that the check was not duly presented: and the judge of the county-court was further of opinion, that, assuming the manner of presentment to be sufficient, the check was not presented in due time; that the non-payment arose from the default of the plaintiffs or of Watkins the payee; and that the defendant was *prejudiced by the delay in presenting, inas- [*291 much as he would have had notice of the dishonour in time to withdraw his balance, had the check been presented by the plaintiffs' agents and been dishonoured on Saturday the 9th of May, and had due notice of the dishonour been given to him.

The questions for the opinion of the court were,—

First, was the check duly presented, as against the drawer, by transmitting it through the post, in the manner above stated?

Secondly, was the check presented by the plaintiffs or their agents in due and reasonable time, as between them and the drawer, to the drawees or their agents?

Thirdly, if the check was not presented as soon as under ordinary circumstances it should have been, do the facts above stated exonerate the plaintiffs for the delay?

Fourthly, was the defendant so prejudiced by the delay as to exonerate him from payment of the check?

Archibald, for the appellants.(a)—The check in question was drawn *292] by the respondent on Wednesday, *the 6th of May, and delivered on the same day to Watkins at Monmouth, which is distant ten miles from Ross, where Morgan & Adams, the bankers upon whom it was drawn, carried on their business. Watkins kept the check until Friday the 8th, when he paid it in to his account at the appellants' bank at Monmouth. The appellants sent it to their London agents, the City Bank, on the same day, and they presented it on Saturday the 9th at Barclay & Co.'s, whose names appeared on the check as the London agents of the drawees,—whose account with them, however, was closed on Thursday the 7th. The check was dishonoured. On the same day (Saturday the 9th), the City Bank sent the check by post to Morgan & Adams, the drawees, who received it on Sunday the 10th. They kept it until Friday the 15th, and then returned it by post to the City Bank. On Monday the 11th, there was a run upon the Ross bank (the drawees), but they continued their business transactions over the counter,—that is, they paid all checks and notes presented at the counter,—until about noon of Wednesday the 13th, when they stopped payment. The City Bank (the London agents of the appellants) received the check back from the Ross bank on Saturday the 16th, and by the same night's post sent it to the appellants. They received it on Sunday the 17th, and on Tuesday the 19th sent a notice of dishonour by post to the respondent (the drawer), whom it reached on Wednesday the 20th. [WILLES, J.—When *293] *was the check refused payment?] When presented at the drawees' London agents, Barclay & Co.'s, presumably on the 9th. As far as concerned transactions with Barclay & Co., the stoppage of the Ross bank took place on the 7th. Upon these facts, it is submitted, there was evidence that the presentment took place within

(a) The points marked for argument on the part of the appellants were as follows:—

"1. That the nonsuit was wrong, and that there was evidence for a jury of the presentment of the check in due and proper time and manner:

"2. That the check was duly presented by transmitting it through the post in the manner stated in the case:

"3. That the appellants were entitled to present the check in the manner described—to or through Messrs. Barclay & Co., and that such presentment was good:

"4. That the check was presented in due and reasonable time, and that there were no laches on the part of any person through whose hands the check passed before presentment:

"5. That the delay (if any) in presentment was, as between the appellants and the drawer, justifiable:

"6. That the respondent was not prejudiced by the delay (if any) in forwarding and presenting the check, and was not therefore discharged;

"7. That there was, as against the respondent, evidence of a usage to transmit money through the post in payment of checks."

a reasonable time, and therefore that the judge was wrong in non-suiting the appellants. [WILLES, J.—He is judge of the facts; and he finds that in fact the appellants did not present the check in due time.] Reasonable time is to be judged of by the circumstances. In the absence of some prejudice to the drawer from the delay, a check may be presented at any time within six years: *Serle v. Norton*, 2 M. & Rob. 401; *Robinson v. Hawksford*, 9 Q. B. 52 (E. C. L. R. vol. 58); *Laws v. Rand*, 3 C. B. N. S. 442 (E. C. L. R. vol. 91). [BYLES, J.—When was the check presented in the country?] On Monday the 11th, the first business day after its transmission from London by the City Bank, the appellants' agents. [BYLES, J.—The judge finds, that, if the check had been presented at Ross *over the counter* on the Monday, it would have been paid. Is there any authority for saying that sending by post to the drawees is a presentment?] It was so assumed in *Hare v. Henty*, 10 C. B. N. S. 65 (E. C. L. R. vol. 100). There, A., a banker at Worthing, received from B., a customer, a check drawn upon C., a banker at Lewes (which is distant about eighteen miles from Worthing), on the morning of Friday the 8th of July, and sent it *that evening* by post to his London correspondent, D., for presentment through the country clearing-house, then recently established, but in pretty general use among country bankers. D.'s clerk handed the check at the clearing-house on the morning of *Saturday the 9th* to the clerk of E., the London correspondent of C. (the drawee), who sent it down by the post of *that evening* to C.: and it was *held that the presentment was in due time. [WILLES, J.—Watkins, the holder of this check, let a whole day go by [*294 before he paid the check in to his bankers'.] The bankers in London made up for that by sending it back earlier than they need have done. The question is,—first, whether the presentment to the London agents of the drawees was not sufficient,—secondly, whether the presentment by post at Ross on the 11th was not in time. It is submitted that the putting the names of the London agents on the check gave the holder the option of presenting it there for payment: the drawees were bound to have the money there to meet it. In *Beeching v. Gower*, Holt, N. P. C. 313 (E. C. L. R. vol. 3), a banker's promissory note was made payable at Tunbridge and likewise in London: and it was held that the holder had a right to present it at either place; and that payment having been refused in London, it was no defence on the part of those who contended that the holder had been guilty of laches, to prove that, if payment had been demanded at Tunbridge, which was the more convenient and nearer place, the note would have been paid. [BYLES, J.—That was the case of a banker's note made payable at two places. But, how can the London agent know the state of the account between the banker in the country and his customer?] The reasonable course to pursue, it is submitted, was, to send the check to the London agents for presentment: and there was no subsequent laches. The course adopted by the City Bank, too, was correct. Morgan and Adams were in the habit of sending cash through the post in payment of checks forwarded to them by other bankers. [WILLES, J.—When was the notice of dishonour?] The decision of the county-court judge proceeds upon the absence of a due presentment, not upon the want of a proper notice of dishonour. [WILLES,

*295] J.—As you put it, the check *was presented and dishonoured on Saturday the 9th, and the notice of dishonour was not sent until the post of Tuesday the 19th. Surely that was unreasonable delay.]

H. Matthews, contra, was not called upon.

ERLE, C. J.—I am of opinion that the decision of the county-court judge was right, and consequently that our judgment must be for the respondent. The check in question, which was drawn upon Morgan & Adams, was given to Watkins on Wednesday the 6th of May. On the 7th, Morgan & Adams ceased to have any correspondent in London. On the 11th their embarrassments began; and on the 13th they stopped payment. If the check had been presented across the counter at any time before noon of the last-mentioned day, it would have been paid. A loss having intervened, the question is whether there has been such delay either in presenting the check or in giving notice of dishonour as to entitle the drawer to cast that loss upon the holder. This depends upon the dates. The check having been received by Watkins on Wednesday the 6th of May, he paid it into his bankers (the appellants) at Monmouth on Friday the 8th. Here was one day's delay. The appellants sent the check by the post of that day to their London correspondents, the City Bank, for presentment through the country clearing-house to the London agents of the drawees, Messrs. Barclay & Co. For the purpose of the present judgment, I assume that this was the proper course for them to take. There was evidence in the recent case of *Hare v. Henty*, in this court, that such a presentment through the country clearing-house was a reasonable course, though nothing was said about that here. At the time the check was *296] received by the City Bank, it is clear that the London *channel for payment was stopped. The City Bank were the agents for the appellants to present the check: did they present it with due diligence? The more direct course undoubtedly would have been to have sent the check back to their own correspondents immediately the payment was refused in London. The City Bank, however, sent it by post on Saturday the 9th to Messrs. Morgan & Adams, the drawees, who received it on the 10th, and kept it (unpaid) until the 15th (Friday), and then,—they having stopped payment in the meantime,—returned it to the City Bank. Assume that the City Bank adopted a usual and a proper course in sending the check by the post to the drawees,—and I am rather inclined to think that that would be a good presentment,—they thereby constituted them their agents to present to themselves. If so, and the check was dishonoured, they clearly ought to have given notice of the non-payment in a reasonable time. Either, therefore, the transmission by post was no presentment at all, or, if a due presentment, then the check was presented and dishonoured on Monday the 11th, and no notice of dishonour was given until Tuesday the 19th. In either view, therefore, there was a want of due diligence. I do not mean to *affirm* that this was a good presentment. I incline to think it was. But, unless the money was remitted by return of post, the absence of an answer should have been considered as a dishonour, and notice of such dishonour should have been given promptly.

WILLES, J.—I am of the same opinion, and for the same reasons.

BYLES, J.—I also am of opinion that the nonsuit was right. Two presentments are relied on by the appellants. One in London on Saturday the 9th of May. *To sustain this, the case of *Beeching v. Gower*, Holt, N. P. C. 313 (E. C. L. R. vol. 3), is referred [*297 to. Now, country bank-notes, which are made payable both in London and in the country, may be presented at either place; for, there is a promise to pay at either. But the mere mention of the names of the London correspondents in the memorandum printed at the foot of a check, imports no more than that the parties so named are the London agents of the drawees. It would be quite novel to hold that checks presented to the persons and at the place thus indicated, and not paid, are dishonoured checks.

Next, was there a due presentment at Ross on Monday the 11th, by the transmission of the check by the post of Saturday the 9th from the City Bank to Morgan & Adams? Morgan & Adams kept it until Friday, the 15th, two days after their stoppage, and then returned it. I abstain from intimating any opinion as to whether the transmission of a check to the drawees in a letter by the post can in strictness be a presentment. It is a question which can but seldom arise; for, evidence of usage in the particular case may, no doubt, make such a mode of presentment good. But, assuming that it might be a good presentment while the drawees were in the habit of so paying checks, it is found as a fact here, that, at the time this check was so transmitted to Morgan & Adams, they had ceased not only to pay through their London agents, but also to honour checks sent to them through the post by London bankers. There has, therefore, I think, been such a default of presentment on the part of the holder of the check as to afford a defence to the drawer if he were damaged thereby. If the check had been presented, as it might have been, across the counter, it appears that it would have been paid. For these reasons I am of opinion that there has been no due presentment, and therefore that the respondent is entitled to keep his nonsuit.

Judgment for the respondent.

*TIDEY v. MOLLETT. May 2. [*298

1. The plaintiff declared upon an agreement for a tenancy in these terms,—“1. Mr. T. (the plaintiff) engages to complete the whole work necessary by the 14th June next.” Then followed an enumeration of the matters to be done by the plaintiff; and the agreement concluded,—“In consideration of these conditions being fulfilled, Mr. M. (the defendant) engages to take the house No. 51, B. Park, for three years, at the annual rent of 130*l.*, to be paid quarterly. Rent to begin from Midsummer next:”—Held, that the completion of the “work necessary” by the day named for that purpose was a condition precedent to the plaintiff’s right to sue the defendant for not becoming tenant.

2. An instrument which is void as a lease, by reason of the provision in the 8 & 9 Vict. c. 106, s. 3, may nevertheless enure as an agreement.

3. *Stratton v. Pettitt*, 16 C. B. 420, overruled.

THIS was an action for the breach of an agreement to become tenant of certain premises.

The second count of the declaration stated that an agreement was made between the plaintiff and the defendant, which said agreement

was so made in the year 1863, and within six lunar months before Midsummer of that year, and was contained in a certain letter and a paper therein enclosed; and the said letter,—a letter written by the defendant, and by him addressed to the plaintiff,—was in the words and figures following, that is to say, “13, Terrace, Camberwell. Sir,—Will you (meaning the plaintiff) be so good as to sign the enclosed, which contains in writing the agreement we (meaning the plaintiff and defendant) made verbally, except that I have added the paragraph as to a lease at the end of the three years. Return it to me when signed, by post. Yours, John Mollett;” and the said paper enclosed in the said letter was in the words and figures following, that is to say,—“1. *Mr. Tidy engages to complete the whole work necessary by the 14th June next.* 2. The stairs to the kitchen are to be made less steep. 3. The division of the bath from the other part of the room is to be made when required by Mr. Mollett. 4. A green-house is to be erected of respectable appearance and size, and to be warmed by hot-air flue. 5. A door from the garden to the road is to be made. 6. Bells are to be hung throughout the house, and finger-plates to be *299] affixed to all the doors, as may be required by *Mr. Mollett. 7. In case of any of the work proving defective, such as doors opening badly, cracking, &c., within six months, all is to be made good by Mr. Tidey. This arrangement applies also to the drainage. The water is to be laid on to the upper part of the house; and other deficiencies which may appear are to be made good by Mr. Tidey, and as may be decided by Mr. Colchester. *In consideration of these conditions being fulfilled, Mr. Mollett engages to take the house No. 51, Belsize Park, for three years, at the annual rent of 130*l.* per annum, to be paid quarterly. At the expiration of the three years, Mr. Mollett is to have the option of continuing possession by taking a lease for seven, fourteen, or twenty-one years, on the terms of this agreement. Rent to begin from Midsummer next. London, 22d May, 1863.*” And the plaintiff signed and returned to the defendant the said enclosed paper, as requested by the said letter. Averment, that the plaintiff had done everything, and all things were done and happened, necessary to entitle the plaintiff to have the defendant take the said house for three years at the said rent, as agreed; yet that the defendant did not nor would take the said house for three years at the said rent, as agreed, but wholly refused so to do, whereby the plaintiff lost all the benefit of the said agreement and the said rent, and was prevented from letting the said house to other persons, and incurred great expenses in fitting up and preparing the said house for the defendant, and was otherwise injured and damnified.

The third count stated that the plaintiff sued for that the said agreement was made as and at the time in the said second count mentioned; and that all things were done and happened, and all times *300] elapsed before the said breach necessary to entitle the plaintiff *to have the defendant take the said house for the said three years, at the said rent, as agreed, and to sue for the breach thereafter mentioned, except certain things which the defendant prevented the plaintiff from doing; yet that the defendant did not nor would take the said house for three years at the said rent, as agreed, whereby the

plaintiff sustained similar damage to that in the second count mentioned.

Third plea, to the second count, that the plaintiff did not fulfil the conditions on his part in the said agreement contained, in this, that, although required by the defendant so to do, the plaintiff did not complete the whole work necessary by the 14th of June, as in the said agreement provided.

Fourth plea, to the third count, the defendant, to avoid repetition, pleads the same facts which are pleaded to the second count; and he further says that he did not prevent the plaintiff as in the third count alleged.

Demurrer to the third and fourth pleas, the ground of demurrer assigned in the margin being, "that the objection is, that the doing of what the plaintiff agreed to do was not a condition precedent." Joinder.

Macnamara, in support of the demurrer.(a)—The question is whether it was a condition precedent to the defendant's liability under this agreement that the whole of the work stipulated to be done by the plaintiff should have been done by the 14th of June. Some of the things stipulated for,—the third and the *seventh, [*301—for instance,—cannot be conditions precedent. This shows that the words "in consideration of these conditions being fulfilled," are not to be taken in their literal sense. It is consistent with these pleas, that all but a very insignificant portion of the work may have been done by the 14th. At all events, it is not shown that the whole was not done by the 24th, when the tenancy was to commence. [BYLES, J.—It does not appear when the tenancy was to commence.] The rent was to commence from the 24th of June. In the notes to *Pordage v. Cole*, 1 Wms. Saund. 320 *e* (b), it is said, that, "where a day is specified for the performance of certain works, and money is to be paid on performance, although the works be not performed on the day specified, yet an action may be maintained for the money when they are performed, and the party who is to pay the money must have recourse to a cross-action for any damages occasioned by the delay." For this position the learned editor refers to *Cock v. Curtoys*, K. B., M. T. 2 G. 4, and *Lucas v. Godwin*, 3 N. C. 737 (E. C. L. R. vol. 32), 4 Scott 502. In *Lucas v. Godwin*, the plaintiff contracted to build cottages by the 10th of October: they were not finished till the 15th: the defendant having accepted the cottages, it was held that the plaintiff might recover the value of his work, on a declaration for work and labour and materials. In giving judgment, Tindal, C. J., says: "If it be said that the completion by the 10th of October is a condition precedent, at least the objection should have been taken at the time. It is not a condition, but a stipulation, for non-observance of which the defendant may be entitled to recover damages: but, even if it be a condition, it does not go to the essence of the contract, and is no answer to the plaintiffs' claim for the work actually done." And

(a) The point marked for argument on the part of the plaintiff was as follows:—

"That the doing of what the plaintiff agreed to do, as in the second and third counts of the declaration mentioned, was not a condition precedent to the obligation on the part of the defendant to take the house, as agreed by him."

*302] Bosanquet, J., says: "The work which was to have been *completed on the 10th was not completed till the 15th of October: but the completion by the 10th is not a condition precedent: it does not go to the essence of the contract; and any inconvenience occasioned by the deviation might have been compensated in an action for damages." (a) In *Lang v. Gale*, 1 M. & Selw. 111, upon a sale of land, it was agreed by the conditions of sale that an abstract of the title should be delivered to the purchaser within a fortnight from the date thereof, to be returned by him at the end of two months from the said date, and that a draft of the conveyance should be delivered within three months from the said date,—it was held that the delivery of the draft of the conveyance within three months was not a condition precedent with respect to its delivery within the precise time. "I do not," said Bayley, J., "consider the precise time of the delivery as an essential ingredient in that condition, which was meant only to secure a delivery within a reasonable time." So, here, it is submitted that it is not essential that all the things stipulated to be done should be completed by the day named. It could hardly be essential to a contract which was not to take effect until the 24th of June, that the things to be done by the plaintiff should be completed by the 14th. [WILLES, J., referred to *Glaholm v. Hays*, 2 M. & G. 257 (E. C. L. R. vol. 40), 2 Scott N. R. 471, where by a charter-party it was agreed that the vessel should proceed to Trieste, and there load a full cargo of wheat, &c., and, being so loaded, should therewith proceed to a port in the united kingdom,—"*the vessel to sail from England on or before the 4th of February then next*:" and it was held that the sailing of the vessel from England on or before the day named was a condition *precedent to the owner's right to sue the merchants for not providing a cargo at Trieste.] Behn v. Burness, 32 Law J., Q. B. 204, is to the same effect. In *Ritchie v. Atkinson*, 11 East 295, where the master and freighter of a vessel of 400 tons mutually agreed in writing that the ship, being every way fitted for the voyage, should with all convenient speed proceed to St. Petersburg, and there load from the freighter's factors a *complete* cargo of hemp and iron, and proceed therewith to London, and *deliver the same*, on being paid freight, for hemp 5*l.* per ton, for iron 5*s.* per ton, &c.; one half to be paid on right delivery, the other at three months,—it was held that the delivery of a *complete* cargo was not a condition precedent; but that the master might recover freight for a short cargo at the stipulated rates per ton; the freighter having his remedy in damages for such short delivery. Whether, said Lord Ellenborough, the delivery of a complete cargo be a condition precedent, "depends, not on any formal arrangement of the words, but on the reason and sense of the thing, as it is to be collected from the whole contract; whether of two things reciprocally stipulated to be done, the performance of the one does in sense and reason depend on the performance of the other." After referring to the rule well laid down by Lord Mansfield in *Boone v. Eyre*, 1 H. Bl. 273, 6 T. R. 573, his Lordship adds: "All the cases of conditions precedent have been where the thing to be done was a strict indivisible condition." *Carpenter v. Blandford*, 8

(a) See the authorities referred to and discussed in the notes to *Cutter v. Powell*, 1 Smith's Leading Cases, 5th edit. 11-15.

B. & C. 575 (E. C. L. R. vol. 15), 4 M. & R. 93, is also an authority to show that the day was immaterial. [WILLES, J.—That was one of those cases where, in order to avoid a penalty, a particular construction has been put upon the instrument.] To constitute a condition precedent, the language should be clear and unequivocal. [BYLES, J.—Does “necessary” here mean *necessary to the convenient [*304 occupation of the house, or necessary with respect to time?] It must mean necessary to the convenient occupation of the house. What follows explains it. It will be contended on the other side that this being a demise for three years, to commence at a future day, it is void because not under seal. But, though void as a lease, it is good as an agreement.

Bosanquet, contra.(a)—The declaration is bad, being founded upon an instrument which is a void lease under the 8 & 9 Vict. c. 106, s. 3. In Bacon’s Abridgment, *Leases and Terms for Years*, a lease is defined to be “a contract between lessor and lessee, for the possession and profits of lands, &c., on the one side, and a recompense by rent or other consideration, on the other.” And, as to the form of words necessary to constitute a demise, it is laid down, (K), pl. 1, that, “whatever words are sufficient to explain the intent of the parties, that the one shall divest himself of the possession, and the other come into it for such a determinate time, such words, whether they run in the form of a license, covenant, or agreement, are of themselves sufficient, and will in construction of law amount to a lease for years as effectually as if the most proper and pertinent words had been made use of for that purpose; for, a lease for years being no other than a contract for the possession and profits of the lands on the one side, and a recompense of rent or other income on the other, if the words made use of are sufficient to prove such a contract, in what form soever they are introduced, or however variously applicable, the law *calls in [*305 the intent of the parties, and models and governs the words accordingly.” This instrument falls directly within that definition. The defendant engages to take the house for three years from midsummer,—with the option of continuing possession for seven, fourteen, or twenty-one years on the same terms. [WILLES, J.—You rely on *Stratton v. Pettitt*, 16 C. B. 420 (E. C. L. R. vol. 81): but a different notion has since prevailed in the Queen’s Bench and in the Exchequer. In *Bond v. Rosling*, 1 Best & Smith 371 (E. C. L. R. vol. 101), by agreement not under seal, the plaintiff agreed to let and the defendant to hire certain premises for seven years; and it was further agreed that a good and sufficient lease embodying the terms of the agreement should be prepared at the joint expense of the parties: in an action for not accepting a lease, it was held, that, though the instrument was void as a lease, by the 8 & 9 Vict. c. 106, s. 3, it was good as an agreement. So, in *Rollason v. Leon*, 7 Hurlst. & N. 78, the plaintiff declared on the following agreement in writing, made in January, 1861,—“L. agrees to let, and R. agrees to take, the good-will, situate, &c., with the house and land adjoining, for the period of three years

(a) The points marked for argument on the part of the defendant were as follows:—

“1. That the doing of the matters not done was a condition precedent:

“2. That the declaration is bad, as showing a demise for three years, to commence at a future day, and not being by deed.”

from Lady-Day now next, at the rent of 120*l.* per annum: a lease for the same to be executed and signed as soon as possible, subject to the permission of H., landlord of the mill. L. also agrees to let and R. agrees to take the said mill, house, land, &c., from this date up to Lady-Day now next, on the same terms and at the same rate of rent, R. to have the sole use of the mill, house, and land, &c., and all machinery and utensils therein contained." It was held that the agreement operated as an actual demise from its date up to Lady-Day, and as an agreement for a lease from that time for a term of three years, and consequently was not void under the 8 & 9 Vict. c. 106, s. 3, for *306] not being under seal.] The *instrument there was not intended to be a lease: this was. Then, the completion of the repairs and alterations necessary by the 14th of June was clearly a condition precedent to the defendant's obligation to take possession. The defendant might well insist upon such a condition, in order that he might have time to provide himself with another house by the 24th, in case the plaintiff should fail to perform his engagement. Lord Mansfield lays it down in a case where the question was whether certain words in a covenant amounted to a condition precedent or not,—*Kingston v. Preston*, cited in *Jones v. Berkeley*, 2 Dougl. 684,—"*that the dependence or independence of covenants was to be collected from the sense and meaning of the parties, and that, however transposed this might be in the deed, their precedency must depend on the order of time in which the intent of the transaction requires their performance.*" The agreement here is to be construed *reddendo singula singulis*. This is not like the case of *Lang v. Gale*, 1 M. & Selw. 111: the day is of the essence of the contract here. It is more like the case of the charter-party, where the vessel's being at a particular port on a given day, was held to be a condition precedent to the owner's right to sue the charterer for not furnishing a cargo,—*Glaholm v. Hays*. In *Lucas v. Godwin*, the defendant had accepted the cottages. That it was competent to the defendant by express stipulation to make the day essential, is clear from *Marshall v. Powell*, 9 Q. B. 779 (E. C. L. R. vol. 58), and *Gore v. Lloyd*, 12 M. & W. 463. In *Maryon v. Carter*, 4 C. & P. 295 (E. C. L. R. vol. 19), where it was part of a condition precedent to the claim of a sum of 80*l.*, in addition to the purchase-money for a new house, that the pavement in front of the adjoining houses should be laid down by the 21st of April,—it was held that the delay of four *307] days, though occasioned by bad weather, which prevented the *workmen from proceeding, was sufficient to prevent the recovery of such claim. The words "in consideration of these conditions being fulfilled," show clearly that performance by the 14th of June was considered essential.

Macnamara, in reply.—Though not valid as a lease, the court will still give effect to this instrument as an agreement. In *Parker v. Taswell*, 27 Law J., Ch. 812, an agreement for letting a farm for ten years, though void at law, under the 8 & 9 Vict. c. 106, as a lease, was held by Lord Cranworth, C., to be valid as an agreement; and specific performance of it was decreed. [ERLE, C. J.—We are all agreed upon that point.] Reliance is placed upon the words "In consideration of these conditions being fulfilled," to show that the completion of the necessary work by the 14th of June was intended to be a condition

precedent. Similar words, however, were used in *Boone v. Eyre*, 1 H. Bl. 273, (a) and also in *Stavers v. Curling*, 3 N. C. 355 (E. C. L. R. vol. 11), 3 Scott 740, (b) and yet it was held that there was no condition precedent. [BYLES, J.—We held the other day that the word “condition” may mean “stipulation.” (c)] Unless the Court see that the completion by the 14th of June goes to the root and essence of the bargain, they will hold that it was enough if the repairs were completed by the 24th, the day on which the tenancy was to commence. The declaration alleges performance generally: the plea is, that the work was not completed by the 14th: the inference therefore would be that it was done before the day fixed for the commencement of the tenancy.

*ERLE, C. J.—I am of opinion that our judgment upon this demurrer must be for the defendant. It seems to me that the [*308 instrument declared on is an agreement, and not a lease. The terms used manifestly show that that was the intention of the parties. Although at one period the courts strove to construe these documents to be present demises, yet, since the 8 & 9 Vict. c. 106, for the same reason, the judges will, if they contain words of agreement, construe them to be agreements only, and not demises,—ut res magis valeat quam pereat. The Court of Queen’s Bench in *Bond v. Rosling*, 1 Best & Smith 371 (E. C. L. R. vol. 101), the Court of Exchequer in *Rollason v. Leon*, 7 Hurlst. & N. 73, and the Court of Chancery in *Parker v. Taswell*, 27 Law J., Ch. 812, all confirm that view. The defendant is sued for the breach of an agreement to become tenant of a house. The promise is in these words,—“In consideration of these *conditions* being fulfilled, Mr. M. (the defendant) engages to take the house No. 51 Belsise Park for three years, at the annual rent of 130*l.* per annum, to be paid quarterly. Rent to begin from Midsummer next.” The “conditions” are, amongst others,—“Mr. T. (the plaintiff) engages to complete the whole work necessary by the 14th June next.” That is the condition upon which the defendant relies. The plea (third) is, that, although required by the defendant so to do, the plaintiff did not complete the whole work necessary by the 14th of June, as in the said agreement provided. I am of opinion that that plea discloses the non-performance of a condition precedent. I take the facts to be these,—The plaintiff is the owner of a house which is in the course of construction; and the defendant, who is desirous of becoming tenant, says, “I will take the house on and from the 24th of June, provided certain necessary things (describing them) are completed by the 14th.” The defendant had a *perfect right to make such a stipulation. It [*309 is possible that the 14th of June may have been a very material day. At all events, the parties have stipulated for the completion of the work by that day: and I feel myself bound to give effect to the words of that stipulation. It is said that the words “the whole work necessary” are very indefinite. But, whatever be the meaning of the word “necessary” in the agreement, it means the same thing in

(a) “The plaintiff well and truly performing all and everything therein contained on his part to be performed.”

(b) “On the performance of the before-mentioned terms and conditions on the part of the plaintiff.”

(c) See *Hayne v. Cummings*, post.

the declaration, and the plea takes it up in the same sense as the declaration; and the demurrer admits that "the work necessary," in the sense in which those words are used in the declaration and in the plea, was not done by the 14th of June. The plaintiff, therefore, has failed in the performance of a condition precedent; and the defendant had a right to say that he declined to go on with the contract.

WILLES, J.—I am of the same opinion. It has been ingeniously argued for the plaintiff, that the completion of the matters stipulated for by the 14th of June could not be essential to the defendant's enjoyment of the premises, seeing that the tenancy was not to commence until the 24th. But the proper answer, I think, was given by the defendant's counsel, viz., that completion by the 14th might well be essential, in order that the defendant might assure himself of that or some other place to lay his head in by the 24th. I think we are not at liberty to say that the stipulation for completion by the 14th was not a condition precedent.

BYLES, J.—I entirely agree with my Lord and my Brother Willes, that completion by the 14th of June was a condition precedent. There is only one point upon which I wish to make an observation, viz., the *310] construction of instruments of this sort. It appears, *that, first in the Queen's Bench (in *Bond v. Rosling*), and then in the Exchequer (in *Rollason v. Leon*), and afterwards in the Court of Chancery (in *Parker v. Taswell*), and also in this court during the present term, in a case of *Hayne v. Cummings*, post, the error which this court fell into in *Stratton v. Pettitt* has now been corrected; and it is settled, that, though void as a lease by reason of the 8 & 9 Vict. c. 106, s. 3, not being by deed, these instruments may still be held good as agreements for a tenancy.

KEATING, J.—I am of the same opinion, and for the same reasons.
Judgment for the defendant.(a)

(a) See *The London Gas-light Company v. The Vestry of Chelsea*, 8 C. B. N. S. 215 (E. C. L. R. vol. 98).

JAMES ASPINALL TOBIN, who has survived THOMAS TOBIN, v. THE QUEEN.

1. A petition of right will not lie to recover compensation for a wrongful act done by a servant of the Crown in the supposed performance of his duty.
2. Nor will it lie to recover unliquidated damages for a trespass.
3. The commander of a Queen's ship employed in the suppression of the slave-trade on the coast of Africa, seized a schooner belonging to the suppliant, which he suspected of being engaged in slave-traffic; and, it being inconvenient to take her to a port for condemnation in a Vice-Admiralty court, caused her to be burnt:—Held, that this was not a case for a petition of right; the remedy for the wrong, if any were done, being against the person who did it.

THIS was a petition of right pursuant to the statute 23 & 24 Vict. c. 34. The petition was as follows:—

"Victoria Reg.

"Let right be done.

"To the Queen's most excellent Majesty.

"Middlesex. The humble petition of Thomas Tobin, of, &c.,

and James Aspinall Tobin, of, &c., by T. J. Rooke, their attorney, of, &c.,

*"Showeth,—That your suppliants are shipowners and merchants carrying on business in Liverpool, in the county of Lancaster, under the style or firm of Thomas Tobin & Son: [*311

"That your suppliants, as such shipowners and merchants, have for twenty-eight years last past been very largely engaged in the African trade, and for the purposes of such trade have established on the coast of Africa, between the fourth and ninth degrees of south latitude, storehouses and factories where your suppliants' vessels have been used and accustomed to discharge their outward cargoes for the purpose of such cargoes being bartered with the natives on the coast for African produce, and where your suppliants have been used and accustomed to receive in return for such cargoes palm-oil, ivory, gum, coffee and other African produce, which they have been used and accustomed to ship on board their own vessels, and bring direct to Liverpool:

"That, for the purpose of superintending and managing their trade and business on the said coast, your suppliants have for about five years last past employed on the said coast, as their head resident agent there, a highly respectable and trustworthy gentleman of the name of Maunsel Mecham, well qualified to conduct and manage their trade on the said coast, and several responsible officers and servants under the said Maunsel Mecham; and, as your suppliants are informed and believe, all the officers and servants so employed under the said Maunsel Mecham are highly respectable and trustworthy persons, and well qualified to conduct and manage the said trade under the said Maunsel Mecham:

That, in the year 1860, your suppliants, through the said Maunsel Mecham, purchased at Loando St. Paul's, on the said coast, a small vessel or packet-boat then *called The Mary and Isabel, but since called The Britannia, for the purpose of carrying their [*312 goods and merchandise to and from their said factories and storehouses on the said coast; that the said vessel, which at the time of the said purchase was not registered as a British ship, was purchased by your suppliants as aforesaid for the purpose of the same remaining and being used entirely on the said coast in their said trade there; and the same was never intended by your suppliants to be brought, and in fact never was brought by them after they so purchased it as aforesaid, to any British port or place where it could be registered as a British ship; and, as your suppliants never considered that it was necessary (as they are advised and believe it was not) that the said vessel should, for the purpose of its being used by them in their said trade as aforesaid, be registered as a British ship, it never was so registered, and consequently, at the time of its being seized and destroyed as hereinafter mentioned, it was not registered, and had no right to a national flag:

That the said vessel remained the property of your suppliants from the time of its being so purchased by them till it was seized and destroyed as aforesaid, and during all that time was used and employed solely in their said trade, and was not in any way engaged in the slave-trade:

That, in the month of August, 1862, the said vessel required repairs, and, being at the time at a place called Landana, on the said coast, where the said repairs could not be done, she was by the directions and orders of the said Maunsel Meham taken by and under the charge of William Mabbs, a seaman in the employ of your suppliants on the said coast, to a place on the said coast called Cabenda, for the purpose of having the said repairs done at the said last-mentioned place, by D. Francisco Franque:

*313] *That the said vessel, when so taken to Cabenda aforesaid for the purpose of having the said repairs done to her as aforesaid, had on board six barrels of palm-oil as ballast, and seventy planks, to be used in the said repairs; that the said planks, which were thick red African planks, well adapted for repairing such a vessel as the Britannia, and not easily procurable, and which were not spare-planks fitted for being laid down as a second or slave-deck within the meaning of the statutes for the suppression of the slave-trade, were sent by the said Maunsel Meham on board the said vessel from Landana aforesaid to Cabenda aforesaid, for the sole purpose of being used by the said D. Francisco Franque in the said repairs:

That the said vessel arrived at Cabenda aforesaid for the purpose of being so repaired as aforesaid, on or about the 30th of the said month of August; and, in consequence of there being then no caulkers to be procured to work on the said vessel at the said last-mentioned place, she was, on her arrival there as aforesaid, dismantled and left at proper moorings there until the said repairs could be proceeded with; and at the same moorings she remained so dismantled as aforesaid, and having on board the said barrels of palm-oil as ballast, and the said planks to be used for the said repairs as aforesaid, from that time until on or about the 20th day of September, 1862, when she was seized as a vessel engaged in the slave-trade, by and under the orders of Captain Sholto Douglas, then being commander of your Majesty's ship *Espoir*, and employed under the authority of your Majesty for the suppression of the slave-trade, according to the statutes in such case made and provided; and, on the alleged ground that the said vessel was not fit for a voyage to St. Helena, being the place within your Majesty's dominions to which she ought to have *314] been taken for *the purpose of being brought to adjudication in the Vice-Admiralty court there touching the said seizure as aforesaid, she was afterwards, on the said last-mentioned day, with the said barrels of palm-oil, the said planks, and other goods and property of your suppliants then being on board thereof, wholly burnt and destroyed by the said Captain Sholto Douglas, so being such commander, and so employed under the authority of your Majesty as aforesaid, and in the supposed exercise of his duties under such last-mentioned authority:

That the said vessel was not at the time of her being so seized and destroyed as aforesaid in any way engaged in the slave-trade, or liable to be condemned as so engaged:

That the value of the said vessel, palm-oil, planks, and other goods and property of your suppliants so burnt and destroyed as aforesaid, amounted at the time of their being so burnt and destroyed to at least the sum of 1000*l.*; and that, by reason of the premises, your

suppliants have not only lost their said vessel, palm-oil, planks, and other goods and property as aforesaid, but have abandoned their said African trade and been greatly injured in their credit and reputation, and in their said trade and business, and have thereby sustained damages to the amount of 10,000*l*.

Your suppliants therefore humbly pray that your Majesty will be pleased to do what is right and just in the premises, and cause your suppliants to be reimbursed and compensated for the losses, damages, and injuries so sustained by them as aforesaid. Dated, &c.

WILLIAM BOVILL, HUGH M'A. CAIRNS, JAMES KEMPLAY,	}	Counsel for the said Thomas Tobin and James Aspinall Tobin.
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And the said Attorney-General informs the court *here that the said petition of right is bad in substance. [The ground of demurrer stated in the margin was, that "the said petition of right does not show that the Crown is in law responsible for any of the alleged unlawful acts of Commander Sholto Douglas."]

And hereupon, on the 21st of December, 1863, the suppliant James Aspinall Tobin suggests and gives the court here to understand and be informed, that, since the presentation of the said petition of right, and before this day, the suppliant Thomas Tobin died: Therefore let no further proceedings be had in the said petition of right at the suit of the said Thomas Tobin.

And as to the demurrer of the Attorney-General on behalf of Her Majesty, the suppliant James Aspinall Tobin says that the said petition of right is good in substance.

The Attorney-General (with whom were the *Solicitor-General*, *Phinn*, and *West*), in support of the demurrer.(a)—The argument proposed to be offered on behalf of the Crown resolves itself into two points,—first, that, if wrong has been done, the remedy is against Commander Douglas, the person who did it,—secondly, that the Crown is not responsible for acts such as those detailed in the petition.

The vessel, the destruction of which is complained of, is said to have been employed in a lawful trade, and not to have been a slaver, or to have had on board anything which would furnish *primâ facie* evidence of her having been engaged in or intended for the slave-trade; and the acts complained of, viz. the seizure of the *vessel, and her destruction in lieu of her being carried in for adjudication in a Vice-Admiralty court, are the acts of Commander Douglas: there is nothing to connect the Crown with those acts, except the fact of Commander Douglas being an officer of the Royal navy, and employed in the suppression of the slave-trade on the African coast.

1. How stands the matter under the slave-trade acts, 5 G. 4, c. 113, and 2 & 3 Vict. c. 73? The intermediate act of 11 G. 4 & 1 W. 4, c. 55, does not materially affect this question. Now, the title of the 5 G. 4, c. 113, is, "An Act to amend and consolidate the laws relating to the abolition of the slave-trade." It recites that it is expedient that the various acts and enactments relating to slavery and the slave-

(a) The point marked for argument on the part of the Crown was as follows:—

"That the Crown is not liable for the acts of Commander Douglas as alleged to have been done by him in this petition of right."

trade should be consolidated and amended, and then proceeds in s. 1 to repeal all former enactments on the subject, save and except in so far as they may have repealed any prior enactments, or may have been acted upon, or may be expressly confirmed by that act. The 12th section provides "that nothing in this act contained, making piracies, felonies, robberies, and misdemeanors of the several offences aforesaid,(a) shall be construed to repeal, annul, or alter the provisions and enactments in this act also contained imposing forfeitures and penalties or either of them upon the same offences, or to repeal, annul, or alter the remedies given for the recovery thereof; but that the said provisions and enactments imposing forfeitures and penalties shall in all respects be deemed and taken to be in full force; it being the true intent and meaning of this act that the right and privilege heretofore

*317] exercised of suing in Vice-Admiralty courts for the *forfeitures or penalties shall remain in full force and effect as before the passing of this act; and the jurisdiction of the said Vice-Admiralty courts in all cases of forfeitures and penalties imposed by this act is hereby established, given, ratified, and confirmed." After some clauses regulating the mode of dealing with captured slaves, &c., s. 35 provides that "nothing herein contained shall prevent the said courts or any of them having jurisdiction in the principal cause, from adjudging and decreeing the captors, &c., to pay out of their own proper moneys such sums in the nature of costs or damages as the said court shall decree, when it shall appear to the court that the capture, seizure, or prosecution, or the appeal thereon on the behalf of the captor, seizer, or prosecutor, shall not be justified by the circumstances of the case." Section 43 enacts that "all ships, &c., treated, dealt with, carried, kept, or detained as slavers, and all goods and effects that may become forfeited under this act, shall and may be seized by any officer of His Majesty's customs, or by the commanders or officers of any of His Majesty's ships or vessels of war, or any officer bearing His Majesty's commission in His Majesty's army or navy." The 45th section extends to all persons authorized to make seizures under this act the benefit of all the provisions of the 4 G. 3, c. 15, or any other act for the protection of officers seizing and prosecuting for any offence against the act relating to the trade and revenues of the British colonies or plantations in America. The 46th section enacts, that, if any action or suit be commenced against any person for anything done in pursuance of the act, the defendant may plead the general issue and give this act and the special matter in evidence, and that the same was done in pursuance and by the authority of this act, &c. Then, after reciting several treaties with foreign powers, and providing for

*318] *mixed courts and other matters not now material, the act proceeds in s. 73 to enact, that, "when any seizure shall be made or prosecution instituted as or for the violation of any of the provisions of this act, and judgment shall be given against the seizer or prosecutor, or such seizure shall be relinquished by him, it shall be lawful for the lords of the treasury, if to their discretion it shall seem meet, by warrant, signed by any three or more of them, to direct payment to be made out of the consolidated fund of such costs, dam-

(a) The purchase of slaves, fitting out of slavers, shipping goods to be employed in the slave-trade, insuring slaving adventures, serving on board slavers, &c., &c.

ages, and expenses as the said seizer or prosecutor may be liable to pay in respect of such seizure, or any proportionate part thereof." It is plain, therefore, that the act contemplates the ordinary liability of the captor if he has erred, and gives power to the treasury to grant an indemnity,—involving an inquiry which cannot be gone into in a court of justice. Then comes the 2 & 3 Vict. c. 73, "An act for the suppression of the slave-trade," the 1st section of which,—after reciting that "it is expedient that persons employed under the authority of Her Majesty in the detention and seizure of vessels engaged in the slave-trade should be indemnified against the consequences of vexatious suits and actions with which they may be harassed;" that "it is also expedient that power should be given to the Court of Admiralty and to Courts of Vice-Admiralty to adjudicate upon vessels and their cargoes captured for having been engaged in the slave-trade, and also upon slaves taken on board thereof; and it is further expedient to extend the provisions of certain acts of parliament which empower Her Majesty to grant bounties for the capture of vessels engaged in the slave-trade; and that Her Majesty had been pleased to issue orders to her cruisers to capture Portuguese vessels engaged in the slave-trade, and other vessels engaged in the slave-trade not being *justly entitled to claim the protection of the flag of any state [*319 or nation,"—enacts that it shall be lawful for any person or persons in Her Majesty's service, under any order or authority of the Admiralty, or of any one of Her Majesty's secretaries of state, to detain, seize, and capture any such vessels, &c., and to bring the same to adjudication in the High Court of Admiralty of England or in any Vice-Admiralty court within her Majesty's dominions, in the same way as if such vessels and the cargoes thereof were the property of British subjects; and that all persons concerned in or advising the giving of, or giving or issuing, any such order or authority, or acting under or in pursuance thereof, or carrying the same into execution, shall be thereby indemnified. The 2d section enacts that "no action, suit, writ, or proceeding whatever shall be maintained or maintainable in any court in the united kingdom, or in any of Her Majesty's dominions, colonies, or settlements out of the united kingdom, against any person acting under such order or authority, for or on account of being concerned in any search, detention, seizure, capture, or condemnation of any vessel which shall have been found *with slaves on board*, or *equipped for the slave-trade*, or in the arrest or detention of any person found on board such vessel, or for or on account of the cargo thereof, or any act, matter, or thing done in relation to such search, detention, seizure, capture, condemnation, or arrest." The 3d section provides for the trial of vessels captured for being engaged in the slave-trade. The 4th section enacts that "every such vessel shall be subject to seizure, detention, and condemnation under any such order or authority, if, in the equipment of such vessel, there shall be found any of the things hereinafter mentioned,"—amongst others, "Thirdly, spare plank fitted for being laid down as a second or slave-deck." The *court will probably not take judicial [*320 notice of the instructions issued by the Admiralty to commanders under such circumstances. [ERLE, C. J.—Certainly not, unless under the force of the statute. KEATING, J.—Is there any

section in either statute which contemplates and provides for the impossibility of taking a captured ship for adjudication to a Vice-Admiralty court?] None. The statute, it will be seen, distinctly contemplates that no indemnity shall be given against costs and damages, where it cannot be shown that the capture was lawful. The general law as to wrongs of this description will be found in *Le Caux v. Eden*, 2 Dougl. 594, and *Faith v. Pearson*, 4 Camp. 357, 6 Taunt. 439: no action will lie in a court of law; but recourse must be had to the Admiralty court, where complete justice may be done. But it is enough to say that there is a remedy against the wrongdoer in a competent forum. The authorities to show this are numerous. In the case of *The Mentor*, 1 C. Rob. 179, where an American ship was destroyed by two ships of Admiral Digby's squadron cruising off the Delaware in 1783, after the cessation of hostilities, but before the knowledge of that fact had come to either of the parties, and it was sought to make the Admiral responsible, Sir W. Scott, in giving judgment, says: "The third peculiarity I must notice, is, an entire novelty in a prize cause, viz. that it is a proceeding for calling to adjudication, not the immediate alleged wrongdoer, but a person who was neither present at nor cognisant of the transaction; and who is to be affected in responsibility merely on this ground, that the person alleged to have done the injury was acting under his general authority; for, as to particular orders applying to this transaction, it is not pretended that any were given or could be given. He was only the Admiral on the general station; and the ships which committed the *321] alleged *outrage were under his general command, but at a great distance from him. Now, really, it appears to me that it is the very first time that the attempt has been made in a prize cause to pass over the person from whom the alleged injury has been received, and to fix it on another person, on the ground of a remote and consequential responsibility: and I call upon the experience of persons attending in this court to state whether there is an instance of that kind to be found in the annals of the court. *The actual wrongdoer is the man to answer in judgment*: to him responsibility is attached in this court." There are cases where the ship has been lost or destroyed, and yet the injured party has been allowed to sue the captor in the Admiralty court. Such were the cases of *The Nemesis*, 1 Edwards Adm. R. 50, and *The Acteon*, 2 Dods. 48. In the last-mentioned case, Sir W. Scott, after stating the general rule applicable to cases of this description, says: "Neither does it make any difference whether the party inflicting the injury has acted from improper motives or otherwise. If the captor has been guilty of no wilful misconduct, but has acted from error and mistake only, the suffering party is still entitled to full compensation, provided, as I before observed, he has not by any conduct of his own contributed to the loss. The destruction of the property by the captor may have been a meritorious act towards his own government; but still the person to whom the property belongs must not be a sufferer. As to him, it is an injury for which he is entitled to redress *from the party who has inflicted it upon him*: and, if the captor has by the act of destruction conferred a benefit on the public, *he* must look to the government for his indemnity." That is the doctrine which ultimately led to the

introduction of the indemnity clause into the slave-trade acts. A similar case is that of *The Felicity*, *2 Dods. 381. In the case of *The Volcano*, 2 W. Rob. 337, the commander of a Queen's ship was condemned in a cause of damage, the collision having been occasioned by his anchoring too near the damaged vessel, and having anchored with only one anchor down, the weather being squally and tempestuous at the time. In *Harrison, app., The Queen and Thomas Miller, resp.*, 10 Moore's P. C. 201, a vessel employed on the coast of Africa, in the palm-oil trade, belonging to British owners resident in England, was seized by a British cruiser, on the ground of having false papers on board, and being otherwise fitted up for the purposes of the slave-trade. The commander sent the captured vessel with a prize-crew to St. Helena for condemnation. The master, mate, and crew, being compelled by the captors to go on board the cruiser, did not accompany the vessel to St. Helena. The Vice-Admiralty court at St. Helena condemned the vessel as being engaged in the slave-trade, contrary to the statute 2 & 3 Vict. c. 73. The proceedings in that court were *ex parte*, no one being present to represent the owners, who were not informed of the seizure or subsequent condemnation till some months afterwards, when they asserted an appeal to the Queen in council. In these circumstances, a libel on their behalf was admitted in the appellate court: and it was held by the judicial committee (reversing the sentence of condemnation) that the seizure was unwarranted, there being no probable grounds to justify a careful commander making such a seizure; and the vessel was decreed to be restored, with costs and damages *against the commander*. It is clear, therefore, that there is abundant remedy in the Admiralty court against the person committing the wrong. It is by no means clear that there may not be a remedy by action in a court of law also. In *Madrazo v. Willes*, 3 B. & Ald. *353 (E. C. L. R. vol. 5), (a) a foreigner (a Spaniard), who was not prohibited from carrying on the slave-trade by the laws of his own country, was held to be entitled to recover damages in an English court of justice against the commander of a Queen's ship, for the wrongful seizure of a cargo of slaves on board a ship employed by him in carrying on the African slave-trade. The like was held in the remarkable case of *Buron v. Denman*, 2 Exch. 167, where, however, the defendant was held to be justified by the subsequent ratification of his act by the British government and its adoption as an act of state. On similar grounds proceeded the decision of the Master of the Rolls in *The Rajah of Coorg v. The East India Company*, 29 Beavan 300. If, therefore, that which was done here was wrongfully done, the party aggrieved is not without remedy against the wrongdoer.

2. The next question is one of very great importance. The recent act, 23 & 24 Vict. c. 34, in no respect alters the law upon the subject; it was designed merely to facilitate the mode of procedure. This is manifest from the preamble, which recites that "it is expedient to amend the law relating to petitions of right, to simplify the procedure therein, to make provision for the recovery of costs in such cases, and to assimilate the proceedings, as nearly as may be, to the course of

(a) Cited in *Santos v. Illidge*, 6 C. B. N. S. 841, 846 (E. C. L. R. vol. 95).

practice and procedure now in force in actions and suits between subject and subject," and from the 7th section, which enacts, that, "so far as the same may be applicable, and except in so far as may be inconsistent with this act, the laws and statutes in force as to pleading, evidence, hearing and trial, security for costs, amendment, arbitration, special cases, the means of procuring and taking evidence, set-off, appeal, *324] and proceedings in error, in suits in equity and *personal actions between subject and subject, and the practice and course of procedure of the said courts of law and equity respectively for the time being in reference to such suits and personal actions, shall, unless the court in which the petition is presented shall otherwise order, be applicable and apply and extend to such petition of right: Provided always that nothing in this statute shall be construed to give to the subject any remedy against the Crown in any case in which he would not have been entitled to such remedy before the passing of this act." What is the liability of the Crown in a case like this? The petition of right is the proper remedy for the subject where the Crown has in its hands property to which the subject has a legal title, or money which by contract is due to the subject from the Crown. Torts do not come within the reach of the rule: that would be contrary to the fundamental principles of the law. "Petition," says Staundforde, Prerog. c. 22, p. 72, "is all the remedie the subject hath when the King seizeth his land or taketh away his goods from him, having no title by order of his lawes so to do, in which case the subject for his remedie is driven to sue unto his soveraigne lord by way of petition only; for, other remedie hath he not. And therefore is his petition called a petition of right, because of the right the subject hath against the King by the order of his lawes to the thing he sueth for." He then shows how it is to be sued out and how proceeded with. It is in effect in the nature of an interpleader between the Crown and a subject. The Lord Keeper Somers, in giving judgment in *The Bankers' Case*, in the Exchequer Chamber,—in 12 W. 3, 14 State Trials 39, goes very fully into all the learning upon the subject; and more especially at pp. 53 to 62 and 75 to 84. And see Lord Denman's *325] judgment in *The Baron de Bode's Case*, 8 *Q. B. 208, 273 (E. C. L. R. vol. 55). In *The Viscount Canterbury v. The Attorney-General*, 1 Phill. 306, it was held that a petition of right does not lie to recover compensation from the Crown for damage to the property of an individual, occasioned by the negligence of the servants of the Crown. Lord Lyndhurst, C., in the course of a very luminous judgment in that case, says (p. 321): "There is in the way of the petitioner a difficulty which struck me at the very commencement of the argument, and to which I have not had a sufficient answer. It is admitted, that, for the personal negligence of the sovereign, neither this nor any other proceedings can be maintained. Upon what ground, then, can it be supported for the acts of the agent or servant? If the master or employer is answerable upon the principle that *qui facit per alium facit per se*, this would not apply to the sovereign, who cannot be required to answer for his own personal acts. If it be said that the master is answerable for the negligence of his servant, because it may be considered to have arisen from his own misconduct or negligence in selecting or retaining a careless servant, that principle

cannot apply to the sovereign, to whom negligence or misconduct cannot be imputed, and for which, if they occur in fact, the law affords no remedy. Cases have arisen of damages done by the negligent management of ships of war. It has been held, that, where the act is done by one of the crew, without the participation of the commander, the latter is not responsible: *Nicholson v. Mounsey*, 15 East 384. But, if the principle now contended for be correct, the negligence of the seamen in the service of the Crown would raise a liability in the Crown to make good the damage, and which might be enforced by a petition of right. Though several cases of this nature have happened at different periods, it seems never to have occurred to *the parties injured, or to their advisers, that redress could be [*326 obtained by means of a petition of right. It would require, I think, some very precise and distinct authority to establish such a liability, and, in the absence of any such authority, I cannot venture for the first time to lay down a rule which it is obvious would lead to such extensive consequences." At p. 324, his Lordship says: "The remaining question is as to the remedy by petition of right. Does it apply in such a case as the present? Staundforde says 'Petition is all the remedy the subject hath when the King seizeth his land or taketh away his goods from him, having no title by order of his laws to do so; in which case the subject for his remedy is driven to sue unto his sovereign lord by way of petition only, for other remedy hath he not.' He speaks of this proceeding as applicable to the illegal seizure by the King of the *lands* or *goods* of a subject; and, although this is not conclusive against its application to other cases, yet no instance has been cited, with the exception of that of *Gervais de Clifton*, Year Book, 22 E. 3, fo. 5, pl. 12, to which I shall presently refer, in which the remedy by petition of right has been attempted to be applied, to recover, not any property, but damages simply for a wrongful act alleged to have been committed by the Crown or its servants. It seems, indeed, to have been doubted whether a petition of right could even be maintained for a chattel or for anything short of a freehold interest,—1 H. 7, Bro. Abr. *Petition*, pl. 19; and although this opinion does not appear to be well founded (Bro. Abr. *Petition*, pl. 3, 34 H. 6, fo. 51; 7 H. 7, fo. 11; and the above passage in Staundforde), yet, coupled with the absence of any decision or dictum in favour of this attempt, it affords an argument against the application of this remedy to a case like the present. No industry has been wanting on the part of *the petitioner. The Year Books, with the Abridgments of [*327 Fitzherbert and Brooke, and other authorities, have been carefully searched, and no case has been found to warrant this proceeding. The decisions go back several hundred years; and, in the absence of all precedent during so long a period, I think I should not be justified in deciding for the first time that such a proceeding can be maintained. Indeed, if the Crown cannot be guilty of negligence or personal misconduct, and is not responsible for the negligence or personal misconduct of its servants, it follows, of course, that, in those cases there can be no such remedy: and, on the other hand, the absence of all trace of the remedy would itself afford a strong argument against the liability. But the case of *Gervais de Clifton* is relied on as a precedent in favour of the claim. That case,—which stands by itself,

—occurred in the reign of Edward 3. It went off at almost the earliest stage upon a point of form, viz. that the Chancellor had sent the tenor of the verdict, instead of the verdict itself, into the Court of King's Bench. It led to no argument, to no discussion, and to no judgment. It is obvious that the defect in form might have been soon and easily removed: but no steps for this purpose appear to have been taken; and there is no trace of the claim having been afterwards prosecuted. No reliance can, therefore, be properly placed upon this proceeding. But a similar complaint appears to have been made upwards of twenty years before, viz. in the 18th of Edward 2, by Robert de Clifton, at that time the owner of the property; and the nature of the complaint throws, I think, some light upon the other proceeding. The petition states, among other things, that trenches were dug and certain works erected by the wardens of Nottingham Castle, on the land of the petitioner, by which the waters of the Trent were diverted
 *328] from their *accustomed channel, and made to flow over the petitioner's property, and that turves were taken from the petitioner's land to repair these works, and that his estate was by these means much injured, while the King's mills were greatly benefited. It appears, therefore, from this statement, that some of the works complained of were formed on the petitioner's land, and were kept up and repaired by the wardens of Nottingham Castle, who continually exercised acts of ownership for this purpose over the property, and that the works were necessary for the King's mills, four of which must, it was stated, have been otherwise discontinued. There was, therefore, some colour in this case for a petition of right; for, the wardens had formed these works on the petitioner's land, and held and maintained them on account and for the benefit of the King. But still this does not appear to have been a petition of right. It is a petition presented in parliament, and it recites a commission and inquisition; whereas, in a petition of right, the commission and inquisition are subsequent to and consequent on the petition; and the prayer is for a matter of pure grace and favour, viz. that the King would, as a compensation for the injury the petitioner had sustained, appoint him to the stewardship of the Honor of Peveril, paying a small annual rent, as usual, into the Exchequer. The King directed, in answer, that the matter should be referred for inquiry to certain members of the council." And his Lordship comes to the conclusion that the proceeding before him could not be maintained. This case of Gervais de Clifton will probably be strongly relied on for the appellant on this occasion. In Manning's Exchequer Practice, Ch. x., s. 1, p. 84, it is said: "By the law of England, no personal wrong can, for obvious reasons, be imputed to the sovereign. But, when the property of the subject is
 *329] invaded or *withheld, the prerogative does not prevent the injured party from obtaining restitution or payment. Where, however, a right is sought to be established against the Crown itself it would be absurd, as well as indecent, to adopt the mandatory forms of common process. The course therefore prescribed by the common law, is, to address a *petition* to the King in one of his courts of record, praying that the conflicting claims of the Crown and the petitioner may be duly examined. As the prayer of the petition is grantable *ex de bito justitiæ*, it is called a petition of right" (this is, not warranted

by the authorities), "and is in the nature of an action against the King, or of a writ of right for the party, though chattels real, or personal, debts, or unliquidated damages may be recovered under it." This latter proposition is not true in its larger and wider sense. The authority which Manning refers to in support of it is P. 22 E. 3, fo. 5, the case of Gervais de Clifton. The same is repeated in a note to *Ex parte Pering*, 6 N. & M. 477: this was in 1836; the judgment of Lord Lyndhurst in *Lord Canterbury v. The Attorney-General* being in 1844. In Hale's P. C. 43, it is said: "It is regularly true that the law presumes the King will do no wrong, neither indeed can he do any wrong; and therefore, if the King command an unlawful act to be done, the offence of the instrument is not thereby indemnified; for, though the King is not under the coercive power of the law, yet in many cases his commands are under the directive power of the law, which consequently makes the act itself invalid, if unlawful, and so renders the instrument of the execution thereof obnoxious to the punishment of the law." For this is cited Staundf. P. C. 102*b*. Lord Coke, in commenting on the words of the Statute of Westminster 1, c. 15, "*Per maundement le Roy*," 2 Inst. 186, says: "The King, being a body politique, cannot *command but by matter of record, for, *Rex* [*330 *præcipit*, et *Lex præcipit*, are all one, for the King must command by matter of record according to the law." So, in Locke on Civil Government, ch. xviii., par. 206, it is said: "The King's authority being given him only by the law, he cannot empower any one to act against the law, or justify him by his commission in so doing." Lord Shiffeld *v. Ratcliffe*, Hob. 334, 347, *The Attorney-General v. Chitty*, Parker 37, 48, and *The Queen v. Renton*, 2 Exch. 216, are also authorities to show that the Crown is not to be prejudiced by the wrongful acts or mistakes of its officers and servants. Judges and governors have been held responsible for wrongs done to a subject, even though the act has had the approval of the Crown or the government: see *Mostyn v. Fabrigas*, Cowp. 161; *Sutherland v. Murray*, 1 T. R. 538, n.; *Sutton v. Johnstone*, 1 T. R. 493. In the last-mentioned case, Eyre, C. B., in answer to an objection that the plaintiffs' complaint,—that the defendant neglected and omitted to hold a court-martial upon him within a reasonable time,—was *damnum sine injuriâ*, says: "Every breach of a public duty, working wrong and loss to another, is an injury, and actionable,"—that is, against the party doing the wrong. So, in the case of the general warrants, *Money v. Leach*, 3 Burr. 1742, the secretary of state's warrant was held no justification for what the messenger did under it. The judgment of Parke, B., in *Buron v. Denman*, 2 Exch. 188, 189, does not mean to intimate that the subsequent ratification of Captain Denman's act by the Crown gave a remedy by petition of right. An act done by a servant not within the scope of his authority does not impose liability upon his master: *Limpus v. The London General Omnibus Company*, 32 Law J., Exch. 34. [EARLE, C. J.—There, the servant *intended* to do the thing complained of: here, Commander Douglas *intended to do his duty to the Crown and to the [*331 public.] The fair result of all the authorities is, that, if any wrong has been done here, the Crown did not and could not authorize it; and there is nothing to show that the suppliant might not have had a complete remedy against the person who actually did the wrong,

if wrong were done, in the Admiralty court, and possibly also in one of the superior courts of common law. Consequently this is not a case for a petition of right.

Sir Hugh Cairns (with whom were *Kemplay* and *Archibald*), for the suppliant.(a)—The circumstances under which this claim is made against the Crown are these:—Power is given to the Crown to seize the goods of a subject as forfeited, under certain conditions. The Crown appoints an agent to look out for such goods and to seize them. The agent, acting under that authority, and in the bonâ fide exercise of it, seizes the goods of A. B. as forfeited to the Crown, conceiving the conditions which would create a forfeiture to exist. Those conditions in point of fact are found not to exist, and the agent, still acting bonâ fide under his authority, deals with the goods in such a manner that they cannot be restored in specie. It is proposed, first to look at the slave-trade acts with reference to the power to seize and condemn; then to consider how the matter would have stood if this *332] had been a dispute between subject and subject; then to *see if the circumstance of the controversy arising between the Crown and a subject makes any difference; next, to consider whether, because there is or may be a remedy against the agent, therefore the remedy against the Crown is lost; and lastly, whether the suppliant's rights can be affected by any criticism upon the peculiar form of the remedy.

The principal statute is the 5 G. 4, c. 113, and the material sections are those already adverted to, viz. the 2d, 4th, 43d, 44th, 45th, and 51st. These create the forfeiture, and point out the penalties. The 2 & 3 Vict. c. 73 relates to ships belonging to other countries with whom this country had entered into treaties for the suppression of the slave-trade. If it be thought that the 3d and 4th sections have a wider application, they only provide that the existence of certain things shall be primâ facie evidence of the vessel's being engaged in the prohibited traffic. The legislature of course only intended to authorize the seizure of vessels offending.

How stands the law as to principal and agent, where an authority similar to that given by these acts of parliament is conferred upon the latter? The principal gives his agent authority to seize certain goods. The agent, intending to execute that authority, by mistake takes the goods of the wrong person. As between subject and subject, the law in such a case is settled as clearly as can be by reported decisions. The principal is liable for the act of his agent: if it were otherwise, the principal never could be made liable at all. Thus, the sheriff who authorizes his officer to seize the goods of A. B. is liable if the officer by mistake seizes the goods of C. D. Several instances in which the principal has been held to be answerable for wrongful acts done by the agent while acting in the execution of his employment, are col- *333] lected in *Smith's Mercantile Law*, 5th edit. 155 et seq. In *Ewbank v. Nutting*, 7 C. B. 797 (E. C. L. R. vol. 62), it was

(a) The points marked for argument on the part of the suppliant, were as follows:—

“That the petition of right sufficiently shows that the Crown is in law responsible for the alleged acts of Commander Sholto Douglas which occasioned the damages mentioned in the said petition of right; and that the suppliant is entitled to be compensated by the Crown for the said damages, and has good and valid claim against the Crown for the same.”

held by this court that trover lay against a shipowner for a sale by the master of goods, at a place short of their port of destination, under circumstances not consistent with the general scope of the authority conferred upon the master by the owner, though not justifiable as between the shipper and the shipowner. In giving judgment, Wilde, C. J., says: "The captain, acting *bonâ fide*, and meaning to execute the duties of his employment of master, has been guilty of a mistake which in law amounts to a conversion. That which he did, he did as the servant or agent of the owner; and he was not less the agent of the owner, because, meaning to act *bonâ fide* in that character, he has fallen into a mistake." In *Coleman v. Riches*, 16 C. B. 104 (E. C. L. R. vol. 81), the master was held not liable, because the servant was guilty of a wilful fraud. That accords with the decision of the Exchequer Chamber in *Limpus v. The London General Omnibus Company*, 32 Law J., Exch. 34.

Such being the law as between subject and subject, let us see if there is anything to prevent the same principle from applying in the case of the Crown. The case of *Viscount Canterbury v. The Attorney-General*, 1 Phill. 306, is altogether foreign to the matter. Four questions were raised there,—first, whether the protection given by the 6 Anne, c. 31, s. 56, and 14 G. 3, c. 78, to a party in whose house or on whose estate a fire should accidentally begin, extended to fires caused by the negligence of the owner or his servants, or whether it was confined to fires arising from pure accident, in the limited sense of the word,—secondly, whether, assuming that the persons whose negligence caused the fire (at the Speaker's house on the occasion of the destruction of the two Houses of Parliament in 1834) were the servants of the Crown (and not of the *commissioners of woods [*334 and forests), the sovereign was responsible for the consequences of their negligence,—thirdly, whether a petition of right was a form of proceeding applicable to a claim for unliquidated damages,—fourthly, whether the reigning sovereign was liable to make compensation for a wrong done by the servants, and during the reign, of his predecessor. No question of that sort can arise here. The suppliants are not proceeding against the Crown for the negligence of a servant: but they claim compensation for a seizure of their ship on the alleged ground that she was forfeited to the Crown, and so dealt with by an officer of the Crown as to be incapable of being restored in specie. That case, therefore, can have no bearing upon that. To come to the authorities. Staundforde says,—*Prærog.* p. 72,—“Petition is all the remedie the subject hath when the King seizeth his land or taketh away his goods from him, having no title by order of his lawes so to do, in which case the subject for his remedie is driven to sue unto his soveraigne lord by way of petition only; for other remedie he hath not.” Does that limit it to a case of interpleader between the Crown and a subject? Is the remedy lost because the thing seized cannot be restored in specie? “And this petition,” he says, “may be sued as well in the parliament as out of the parliament; and, if it be sued in the parliament, then it may be enacted and passe as an act of parliament, or else to be ordered in like manner as a petition that is sued out of the parliament.” Again, at p. 75, he says: “A man shall have his petition for goods as well as for

lands, as, where the escheator seizeth goods of one who is outlawed, and hath accounted for them in the Exchequer, and after the outlawry is reversed; in this case the party hath no remedy for his goods but *335] only by petition. And this you shall see in T. 34 H. 6, fo. *51." This is the authority referred to in Bro. Abr. *Petition*, pl. 3. In 3 Bl. Com. 254, it is said: "That the King can do no wrong, is a necessary and fundamental principle of the English constitution: meaning that, in the first place, whatever may be amiss in the conduct of public affairs is not chargeable personally on the King, nor is he, but his ministers, accountable for it to the people; and, secondly, that the prerogative of the Crown extends not to do any injury; for, being created for the benefit of the people, it cannot be exerted to their prejudice. Whenever, therefore, it happens, that, by misinformation or inadvertence, the Crown hath been induced to invade the private rights of any of its subjects, though no action will lie against the sovereign (for, who shall command the King?), yet the law hath furnished the subject with a decent and respectful mode of removing that invasion, by informing the King of the true state of the matter in dispute: and as it presumes, that, to *know* of any injury and to *redress* it are inseparable in the Royal breast, it then issues as of course, in the King's own name, his orders to his judges to do justice to the party aggrieved." The common-law methods of obtaining possession or restitution from the Crown of either real or personal property, are,—1. by petition de droit, or petition of right; which is said to owe its original to King Edward the First (Bro. Abr. *Prærogative*, pl. 2; Fitz. Abr. *Error*, pl. 8),—2. by monstrans de droit, manifestation or plea of right: both of which may be preferred or prosecuted either in the Chancery or Exchequer. The former is of use where the King is in full possession of any hereditaments or chattels, and the petitioner suggests such a right as controverts the title of the Crown, grounded on facts disclosed in the petition itself; in which case he must be careful to state truly the whole title of the Crown, *336] otherwise the *petition shall abate; and then, upon this answer being endorsed or underwritten by the King 'soit droit fait al partie' (let right be done to the party), a commission shall issue to inquire of the truth of this suggestion: after the return of which the King's attorney is at liberty to plead in bar, and the merits shall be determined upon issue or demurrer, as in suits between subject and subject." (a) To the same effect are the authorities referred to of 1 Hale P. C. 43, and Manning's Exch. Pr. 84. Much learning upon the subject is also to be found in Lord Somers's judgment in *The Bankers' Case*, 14 St. Tr. 39, and also in a report of the trial at Bar in *Baron de Bode's Case*, by Anstey. Lord Somers says,—14 St. Tr. 59,—"The truth is, the manner of answering petitions to the person of the King was very various: which variety did sometimes arise from the conclusion of the party's petition; sometimes from the nature of the thing; and sometimes from favour to the person; and, according as the endorsement was, the party was sent into Chancery or the other courts. If the endorsement was general, 'soit droit fait al partie,' it must be delivered to the Chancellor of England, and then a

(a) And see Stephen's Com. 4th edit. Vol. 4, p. 58 et seq.

commission was to go to find the right of the party; and, that being found, so that there was a record for him, thus warranted, he is let in to interplead with the King: but, if the endorsement was special, then the proceeding was to be, according to the endorsement, in any other court." Before adverting to the instances cited in Baron De Bode's Case, it may be well to refer to the Statute of Petitions, 8 E. 1, which is assumed to be the foundation of the proceeding by petition of right. The words are,—“For that because the folk which come to the King's parliament are oft-times delayed and disturbed to the great grievance of them *and of the court, by the throng of petitions which are put be- [*337 fore the King, whereof the most might have been dispatched by the Chancellor and justices,—it is provided that all the petitions which touch the Seal do come first to the Chancellor, and those which touch the Exchequer do come to the Exchequer, and those which touch justices or law of land do come to justices, and those which touch jewry do come to the jewry's justices. And, if the businesses be so great, *or so much of grace*, that the Chancellor and those others cannot do them without the King, then they shall bring them with their own hands before the King, to know his will. So that no petition do come before the King and his council but by the hands of the aforesaid Chancellor and the other chief ministers. So that the King and his council may, without charge of other businesses, intend unto the great businesses of his realm and of his foreign lands.” Henry of Aynesham's Case, at p. 54, was a petition for a matter at once of simple contract and unliquidated damages. “To the petition of Henry of Aynesham, plasterer, praying the King to order present payment of xixl. vs. owing unto him from the time when he wrought at the works of the King's castle of Carnarvon, whereof the treasurer hath the certificate, &c. It is thus answered before the King,—Let writ of liberate be made out of Chancery to the treasurer and chamberlains, that they deliver unto him that sum, and charge therewith Hugh of Lymynistre, chamberlain of Carnarvon, &c.:" Rot. Parl. 33 E. 1, No. 48. Estrelang's Case, at p. 54, is a petition for money lent to the King, and for loss of chattels in his service,—“To the petition of the executors of John Estrelang, praying that, whereas cxxxiiil. are in arrear unto him for moneys lent, by way of satisfaction for the horses of the aforesaid John from the time when he stood at the King's service in *Gascony, as appeareth by the letters of the [*338 Earl of Lincoln, &c., there may be paid unto him of the said debt at the King's pleasure, &c., It is thus answered,—Let him have writ of liberate in Chancery unto the treasurer and chamberlains for xxxiiil., in part payment, &c.:" Rot. Parl. 33 E. 1, No. 49. The next, Beisney's Case, Rot. Parl. 33 E. 1, No. 51, is to the same effect in part, and also for an account. “To the petition of Walter of Beisney (or Besin), praying that the King would allow unto him xil. xiiiis. xid. in part satisfaction of xxv marks wherein the King is beholden unto him in the wardrobe for a certain horse of the same Walter which he lost in the King's service in Scotland, and that of the balance of the same xxv marks there may be restitution made him, &c., It is answered thus before the King,—Let him account with John Drokenefford, and bring his bill to the Exchequer, and let allowance be made.” At p. 55 is given a general order whereby all existing

claims for money lent, paid, or received, goods sold and delivered, and other matters of assumpsit were to be liquidated,—“To the petition of all of them that pray restitution of moneys seized to the King’s use by search made in churches; (a) and of wools and hides seized to the King’s use; also of grain and other victual seized to the King’s use; and of moneys borrowed that are in arrear; and also compensation for horses lost in his wars; and of other the King’s debts whatsoever that are demanded of the King, &c., It is thus answered by the King himself,—The King, with the advice of the treasurer and barons of Exchequer, hath ordered them to be satisfied with all the speed possible; so that they *339] *shall hold them content, &c. :” Case of The Debts, Rot. Parl. 33 E. 1, No. 59. The case of The Bishop de Sallowe (14 E. 2), Ryley’s *Placita Parliamentaria*, p. 408, is completely in point. It is thus stated: “Ad petitionem Ricardi Bissop de Sallowe conquerent. quod Johannes de Beaufuy, quondam Vic. Nott. et Derb., ipsum colore officii imprisonavit, &c., et indicatere fecit, &c., Ita responsum est,—Adeat coram Justic. assign. ad querelas de Ministr. Regis in com. Nott., audiend. et terminend., et ibi fiat ei justicia. Ad querelam ejusdem super eodem de eo quod ipse cepit xii quarter. avene ad opus Domini Regis. Et unde admisit allocac. penes dominum Regis, &c., et nichil eis solvit. Ita responsum est: Sequatur coram Thes. et Baron. de Scio, et ibi fiat ei justicia:” Baron de Bode’s Case, p. 56. “Wardon’s Case (at p. 57) was that of an annuity, not charged on land, which had been granted by a former King, and was twenty years in arrear at the time when the petition was brought” (Rot. Parl. 33 E. 1, No. 95). “In Bishop’s Case (also at p. 57), the first petition was for damages by way of satisfaction for the trespass and other wrongous acts of the King’s sheriff; and the second petition was for goods lawfully taken by him for the King’s use, whereof he had had allowance made him in his accounts, but had neglected to pay the petitioner for them. To both petitions appropriate endorsements were made in favour of the claim.” At p. 87, a case is referred to from the Year Book of 34 H. 8, fo. 50 (cited Fitz. Abr. *Petition*, pl. 8), of which it is said: “Two points were there decided: the one, that a petition of right will lie for chattels personal seized to the King’s use by the violence of one of his officers; the other, that money paid to the King, under lawful warrant, but against equity and conscience, may be recovered back by petition of right. The material passages *340] in the case are *as follows:—‘Wangford, Serjt., showed how that heretofore our Lord the King brought writ of debt upon an obligation against one, and how before the judgment given the said King pardoned him omnia debita, computationes et executiones eorundem, to wit, by a general pardon; and, Sir, this matter hath pended a long time in your judgment, wherefore the defendant now prays his judgment, and to be discharged of the debt.’ Danby, Justice: ‘How will you plead this pardon after judgment, seeing that you have been out of court? But, if you would have had the advantage, you ought to have pleaded it before judgment.’ Wangford:

(a) Churches and abbeys were much resorted to in the middle ages for the safe custody of valuables. *Memorias Historicas del Rey D. Alonso el Sabio*, par Mondejar, Lib. viii., cap. 5, pp. 497, 503.

'Sir, we had no day in court before judgment after the verdict passed against us, nor ever more after that; and, before judgment, we were not at any loss; but, by the judgment, now we are in great jeopardy of execution, &c.' And, Sir, we cannot have any *auditâ querelâ*; nor, if we be taken in execution, we cannot have any *scire facias* against the King *ad cognoscendam vel deducendam cartam perdonationis*.' Danby, J. 'You may have your remedy by petition of right to the King.' Wangford: '*That we could not have, but it were a plea of land.*' *Quod fuit negatum per omnes justiciarios; who said that, in many cases, one shall sue by petition to have back his goods and chattels.* As, if the escheatour, *virtute officii*, seize goods, and account for them in the Exchequer, or, otherwise if that one who is outlawed reverse his outlawry, and the escheatour have accounted for his goods,—in all such cases a man shall sue by petition, and shall have remedy; and the King shall say in such form, to wit, 'Let right be done to the parties.'" The case of Conrad de Colon. Mem. Scac. 5, also is as analogous a case as can be. "Monstravit Regi Conrad Mercator. Colon. quod cum ipse in quadam nave cujus medietas est ipsius Conrad, et altera medietas Johannis filii Rudigar le Seland 50 quarteria **avenae* usque London cariari fecisset venditioni exponend. [*341 Gregor. de Rokesley, Major London. credens totam predictam navem cum omnibus in ea contentis fuisse prædicti Johannis aut aliorum rebellium Regis de Holland et Seland navem ipsam xx mcs. et aven. predictam ad cs. ad op. Regis tanquam forisfact. appreciari et capi fecit in manum Regis et ad Scem. Regis liberari et in Thesaur. Regis in ipsius Conrad grave damnum; Et quia dict. Conrad afferit quod non est homo com. Hoyland et Seland, nec de potestate sua, propter quod bona sua predicta contra voluntatem suam in usum Regis converti dum tamen inimic. et rebell. Regis non existat. Maud, Baron, quod si dict. Conrad eis monstrare poterit se non esse de potestate dicti com. aut aliter inimic. et rebellis Regis, nec in aliquo forisfecisse quare bona sua predicta amittere debeat tunc ei de medietate sua predictæ navis et aliis bonis suis predictis debitam restitutionem habere fac. Per hoc breve compert. per inquisitionem et testimonium proborum et legalium hominum quod dict. Conrad non est homo com. Holand et Seland, nec de potestate sua, nec aliter inimic. et rebellis Regis, &c., liberavit eidem Conrado de precepto Thesaur. et Baron. Henr. de Frowick x marcas de precio medietat. predict. navis, et c s. de precio avene sub hac forma quod si predictus Johannes ad gratiam Regis redire conting. et ostendere predict. navem et bona sua esse, &c., quod dict. Conrad acquietab. inde Dominum Regem versus dictum Johannem et quoscunque alios." [WILLIAMS, J.—Is the authority to seize slaves conferred by the Crown? Is it not conferred by the act of parliament?] The Crown appoints the agent, and is responsible for his acts. Lord Lyndhurst, in *Viscount Canterbury v. The Attorney-General*, 1 Phill. 326, took an erroneous view of *Gervais de Clifton's Case*. The Petition of Robert de Clifton, in 18 E. 2,—Rot. Parl. *18 E. 2, No. 3,—is thus given in the Baron de Bode's Case, p. 59:—"To our Lord the King and to his council, [*342 prayeth Robert de Clifton, that whereas two trenches are made through the meadows of the said Robert at Wilford, by our said lord the King's wardens of Nottingham Castle, and four wears are put up

there in sundry places, beyond the Trent water, in the soil of the said Robert on one part, and on the other the said water, by which trenches and wears the same Trent water is turned out of its right course in divers places, and doth pass through the meadows and pastures of the aforesaid Robert even unto the mills of our said lord the King of the castle aforesaid; whereby those same meadows, and the lands of the said Robert lying by the waters there running, are oft-times surrounded and drowned; and the wardens aforesaid have dug, and from day to day do cause to be dug, the said meadows and pastures, and thereof have taken and do take continually turves for the amendment and sustenance of the wears aforesaid; so that this same Robert doth lose the profit of his said lands, meadows, and pastures, in sundry wise; and the Trent water, which is so much stopped by the said wears, skirteth great part of the said vill of Wilford, the which is all in the said Robert's demesne, and which vill is in peril of being drowned by reason of the same wears,—*wherefore the said Robert thereof hath yearly damage to the amount of ten pounds, and for the time past to the amount of fifteen pounds*, and our lord the King thereof hath yearly profit of 20*l.* from four of the said mills, which do go with the waters that do run through the said trenches, and he would lose so much yearly if the said trenches were stopped, *as is found by an inquest taken upon the things aforesaid before Mounsire Richard de Watton and Richard de Wilughby, by commission of the Chancery* *343] **thereunto assigned*, in presence of the warden aforesaid; the which commission and inquest are returned into the Chancery, and of which the tenor is attached unto this petition: May it please our said lord the King and his council that allowance may be made unto the said Robert of the damages aforesaid; and prayeth the said Robert, if it please our said lord the King and his council, that the bailiwick of the honor of Peverell, in the counties of Nottingham and of Derby, the which do rent yearly unto our said lord the King at his Exchequer four marks, may be assigned unto him in recompense of the aforesaid damages." The commission and inquisition are set out. The answer endorsed on this petition is,—“For that this thing doth touch the King so highly, and the said inquest is but of office, let there be some great men of the King's Council assigned to survey, inquire, and certify the King.” In the following reign, Gervais de Clifton (probably the son of Robert) presented his petition of right in respect of the same matter, and obtained in like manner an inquisition finding the truth of his allegations. The record, however, having been informally directed into the Court of King's Bench, no decision was come to upon the merits at that time; and of the subsequent proceedings there are no records. But one thing is clear, that, in that, as in the former case, no one questioned that a petition of right would lie for unliquidated damages. The case, as reported in the Year Book of 22 E. 3, fo. 5, is as follows:—Gervais de Clifton sued unto the King by petition, suggesting that divers trenches and gutters were made in the water of Trent by the wardens of Nottingham Castle, whereby those lands were overflowed, unto his damage, &c.: which petition was directed into Chancery to cause commission to inquire, &c., which was done. And the suggestion was found true; and, more-

over, *that trenches were made on the soil by the said wardens, where the King had built four mills; wherefore he sued unto the King by another petition, praying restitution of his damages, and that this should be redressed: which petition was endorsed and directed into Chancery, to direct the verdict into the King's Bench, and that the justices of that place do cause to come, &c., before them the wardens that now are of Nottingham Castle, and the King's serjeants, and that they do cause to give, &c. Wherefore the Chancellor directed the tenor of the verdict, and venire facias against the wardens that they come, &c. The endorsement of the petition willeth that the Chancellor ought to direct the verdict of the inquest itself, &c., which was taken; and nothing is directed but *the tenor* of the verdict of the inquest, &c. Wherefore, &c. The Court commanded the plaintiff, if he will, to cause the verdict itself to come, and saith to the wardens, let them go without delay. For W. saith that the process made against the wardens was without warrant, inasmuch as the verdict itself was not as directed," &c. Lord Somers, in his judgment in *The Bankers' Case*, 14 St. Tr. 83, 84, says: "I take it to be generally true, that, in all cases where the subject is in the nature of a plaintiff, to recover anything from the King, his only remedy at common law is, to sue by petition to the person of the King. I say, where the subject comes as a plaintiff: for, as I said before, when, upon a title found for the King by office, the subject comes in to traverse the King's title, or to show his own right, he comes in in the nature of a defendant, and is admitted to interplead in the case with the King in defence of his title, which otherwise would be defeated by finding the office. And to show that this was so, I would take notice of several instances." He then proceeds to refer to some of the cases already noticed, and says: **"All these petitions which I have mentioned, are after the statute 8 E 1."* [345 "This law being made, there is reason to conclude that all petitions brought before the King in parliament after this time, and answered there, were according to the method of this law, and of the nature of such petitions as ought to be brought to the person of the King. And that petitions did lie for a chattel as well as for a freehold, does appear 37 Ass. pl. 11, Bro. Abr. *Petition*, 17. If tenant by statute-merchant be ousted, he may have a petition, and shall be restored: vide 9 H. 4, Bro. *Petition*, 9. If the subject be ousted of his term, he shall have his petition: 9 H. 6, fo. 21, Bro. *Petition*, 2. Of a chattel real, a man shall have his petition of right, as of his freehold: 7 H. 7, fo. 11. A man shall have a petition of right for goods and chattels; and the King endorses it in the usual form: 34 H. 6, fo. 51, Bro. *Petition*, 3." He adds: "It is said, indeed, 1 H. 7, fo. 3, Bro. *Petition*, 19, that a petition will not lie of a chattel." But the whole tenor of Lord Somers's argument shows that he was clearly of opinion that a petition of right would lie for a chattel, and even for unliquidated damages. In 4 Inst. 241, Lord Coke says: "It is holden in our books, that, in restitutions, the King himself hath no favour, nor his prerogative any exemption, but the party restored is favoured." It is not the less a petition of right, because it appeals to the grace of the Crown. In delivering the judgment of the Court of Queen's Bench in *The Baron de Bode's Case*, 6 Q. B. 208, 273 (E. C.

L. R. vol. 55), Lord Denman says: "There is nothing to secure the Crown against committing the same species of wrong, unconscious and involuntary wrong, in respect of money, which founds the subject's right to sue out his petition when committed in respect to lands or specific chattels: and there is an unconquerable repugnance to the *346] suggestion that the door ought *to be closed against all redress or remedy for such wrong. The reference from the Crown to the law officers, and that of the law officers to the Chancellor, would seem to reject the ordinary rules and analogies of legal proceedings, in order to arrive at the conclusion whether the subject's right has been in any manner infringed by the Crown, and to show, that, if the infraction is duly proved, reparation ought to be made. The dignity of the Crown itself appears to demand, that, when the inquiry which it has enjoined is so terminated, the proper course for giving effect to its second and more important injunction, that right be done, should be pursued." These observations tend strongly in the same direction. It is said that the Crown cannot suffer prejudice from the negligence or remissness of its agents. The remarks of the judges in *The Queen v. Renton*, 2 Exch. 216, show what is alone meant by that maxim.

Then it is said, that, Captain Douglas being responsible for his illegal act, the suppliant, having another remedy, has no recourse against the Crown. [ERLE, C. J.—There certainly is nothing in the statute to show that Captain Douglas would not be responsible: but we consider that circumstance to be wholly inconclusive of the question whether a petition of right will lie. Complainants are not confined to seek their remedy in the Admiralty court.] The clause enabling the treasury to grant indemnity (5 G. 4, c. 113, s. 73) is not at all inconsistent with the argument. There is nothing in either of the acts to make it compulsory to take a ship seized into the Vice-Admiralty court for condemnation. The question has nothing to do with prize: a prize court is not a court of Admiralty; it is held under a warrant which may be addressed to any one. The whole question is well treated in a note in Chitty's edition of Vattel's Law of Nations (1834), *347] p. 392, n., where a great many authorities are collected. *The mere fact of there being one or more concurrent remedies cannot militate against the suppliant's rights in this form.

The Court took time to consider whether or not they would hear the Attorney-General in reply: but, on the following morning, they intimated that they did not desire to receive any further information.

Cur. adv. vult.

ERLE, C. J., now delivered the judgment of the court: (a)—

In this case the suppliant has petitioned for the amount of damages sustained by him from the loss of his vessel; and by the demurrer to the petition the following facts are admitted, viz., that the vessel was seized as being engaged in the slave-trade, by Captain Douglas; that Captain Douglas commanded a ship of Her Majesty's, and was employed for the suppression of the slave-trade, according to the statutes relating thereto; that the vessel of the suppliant was afterwards destroyed by Captain Douglas in the supposed performance of his

(a) The judges present at the argument were, Erle, C. J., Williams, J., Willes, J., and Keating, J.

duty; and that the vessel was not at the time it was so seized and destroyed in any way engaged in the slave-trade, or liable to any proceedings as if it had been so engaged.

This statement shows a wrong for which an action might lie by the suppliant against Captain Douglas: but we are of opinion that it does not show a complaint in respect of which a petition of right can be maintained against the Queen; and for this opinion we rely on these grounds,—first, that Captain Douglas, in seizing the vessel, was not acting in obedience to a command of Her Majesty, but in the supposed performance of a duty imposed upon him by act of *par- [*348
liament,—secondly, if it be assumed that he was an agent employed by the Queen to seize vessels engaged in the slave-trade, that he was not acting within the scope of his authority in seizing a ship not engaged in the slave-trade, and for that reason did not make his principal liable for a seizure made without authority from that principal,—thirdly, that a petition of right cannot be maintained to recover unliquidated damages for a trespass.

As to the first ground,—if the vessel of the suppliants had been lawfully seized, Captain Douglas would have performed a duty imposed upon him by the statute 5 G. 4, c. 113, s. 43, enacting that vessels engaged in the slave-trade shall be seized by the commanders of ships of Her Majesty; and, although he was appointed to the ship, and ordered to the station, and employed by the Queen, still we think that the duty which he had to perform in relation to the slave-trade was not created by command of the Queen, nor would he have been doing an act which the Queen had commanded, if the seizure had been made lawfully under the statute. The allegations on the record show that the seizure, although intended to be in accordance with the provisions of the statute, was unlawful, because not authorized thereby. They further show that the vessel was not seized for the purpose of making it the property of Her Majesty; and, if lawfully seized, it would not have been in the possession of Her Majesty: but, under s. 44, the captors had the duty of taking it to the Vice-Admiralty court for condemnation; and, if condemned, the captors were bound to sell and divide the proceeds of the sale, and it could not be till after these contingencies had happened, and the sale had taken place, that the interest of the Crown in a share of the proceeds of the sale according to the statute would commence: and under s. 35 the captors would *have been liable to a judgment against them in that court for [*349
damages and costs, if they had been found to be in the wrong. Thus, as Captain Douglas would not have been an agent of the Crown if he had lawfully seized and kept the vessel under the statute, still less ought he to be held to be such agent in seizing and destroying it unlawfully.

Secondly, if it be assumed that Captain Douglas had authority from the Crown to seize all ships engaged in the slave-trade, so that the seizure, if lawful, would have been made by him in the capacity of agent for the Crown, still, if he seized a ship not engaged in the slave-trade, he would not act within the scope of that authority, and would not make his principal liable for that wrong. Thus, where a warrant was granted by the secretary of state to apprehend the author of *The North Briton*, and the defendant, upon good ground of

in the fullest extent, with the unusual power for a deputy to appoint a deputy, and make the principal responsible for every act of a bailiff done under a warrant issued by the under-sheriff.

As we do not suppose that the suppliant would place any reliance on the responsibility of the sheriff for his bailiffs as of itself establishing the responsibility of the Queen for every party employed in the administration of government, we do not say more on the point than that on these two narrower grounds our judgment is for the Crown.

On the third ground above mentioned, viz. that a petition of right cannot be maintained to recover unliquidated damages for a trespass, our judgment is also for the Crown.

The complaint is, of a wrong done in destroying a ship; and the claim is for damages, the same as might have been awarded, if, instead of a petition of right, an action of trespass had been brought against the trespasser. For the purpose of showing that a petition of right cannot be maintained for this complaint, we propose to refer, first to the principle that the sovereign cannot be guilty of a wrong, and so cannot be made liable to pay damages for a wrong of which he cannot be guilty, and then to the authorities which show where a petition of right will and where it will not lie,—premising that the statute 23 & 24 Vict. c. 34 alters only the form of procedure to be adopted by suppliants resorting to a petition of right, and does not alter the law relating to the subjects for which the petition of right can be maintained; it being declared by s. 7, that no remedy is thereby given which was not before existing.

*354] The maxim that the King can do no wrong is true *in the sense that he is not liable to be sued civilly or criminally for a supposed wrong. That which the sovereign does personally, the law presumes will not be wrong: that which the sovereign does by command to his servants, cannot be a wrong in the sovereign, because, if the command is unlawful, it is in law no command, and the servant is responsible for the unlawful act, the same as if there had been no command. Lord Hale says,—Hale's P. C. 43,—“The law presumes the King will do no wrong, neither indeed can do any wrong; and therefore, if the King command an unlawful act to be done, the offence of the instrument is not thereby indemnified. But, although the King is not under the coercive power of the law, yet, in many cases his commands are under the directive power of the law, which consequently makes the act itself invalid, if unlawful, and so renders the instrument of the execution thereof obnoxious to the punishment of the law.” Lord Coke also says to the same effect, in commenting on *Præceptum Regis*, in the statute of Westminster 2 (2 Inst. 186).—“The King, being a body politique, cannot command but by matter of record; for *Rex præcipit* and *Lex præcipit* are all one; for, the King must command by matter of record, according to the law:” and he adds: “Markham said to King Edward I., that the King could not arrest any man for suspicion of treason or felony, as any of his subjects might, because, if the King did wrong, the party could not have his action. If the King command me to arrest a man, and accordingly I do arrest him, he shall have his action of false imprisonment against me, albeit he was in the King's presence.” And he adds,—“Bracton says, *Nihil aliud potest Rex, quam quod de jure potest.*”

To the same effect is 3 Bl. Comm. 246,—“The King can do no wrong; which ancient and fundamental maxim is not *to be understood [*355 as if everything transacted by the government was of course just and lawful, but means only two things,—first, whatever is exceptionable in the conduct of public affairs is not to be imputed to the King, nor is he answerable for it personally to his people; for, this doctrine would destroy the constitutional independence of the Crown,—and, secondly, that the prerogative of the Crown extends not to do any injury.”

This maxim has been constantly recognised; and the notion of making the King responsible in damages for a supposed wrong tends to consequences that are clearly inconsistent with the duty of the sovereign.

We come now to the authorities showing where the petition of right will and where it will not lie. We pass the class of claims founded on contracts and grants made on behalf of the Crown with brief notice, because they are within a class legally distinct from wrongs. In *The Banker's Case*, 14 State Trials 83, Lord Somers so treats them, giving various instances of petitions for money on account of wages, and work, and debts, and goods, founded on contract; and he makes no allusion to a claim against the King for damages for a wrong.

We pass from the class of claims on contract,—in all systems of law distinguished from claims founded on wrong,—and proceed to the more numerous class of claims where petitions of right have been brought in respect of property either wrongfully taken on behalf of the Crown, or wrongfully withheld.

As a general principle, property does not pass from the subject to the Crown without matter of record. In the time of feudal tenures, rights in property accrued to the Crown on very many occasions, and officers had the duty of enforcing the rights of the Crown. The right accrued on some of these occasions by matters of record, and on other occasions powers *existed for the making the right matter of record, by office found. The officers seized, or justified seizures, [*356 under these records; and their right to seize was a subject of frequent contest tried either by petition of right, or *monstrans de droit*, or *traverse of office found*.

It has been said that the petition of right took its origin under Edward the First, and was substituted for a *præcipe* against the King: and it has been suggested, that, if the fact were so, it would indicate that an action lay against the King where it would lie against a subject, that is, where a *præcipe* might issue. But, in our opinion, the point relates to procedure only, and not to the law of right, and therefore is not material on the present inquiry. The authority for the notion is found in Fitzherbert's *Abridgment*, *Errour*, pl. 8 (citing 22 E. 3). A petition of right had been referred to parliament, and the parliament ended; and it was decided that the petition of right was thereby brought to an end also. At the end of the *placitum* containing this decision, Fitzherbert adds,—“*Et fuit dit qu' en temps le Roi Henry et devant, le Roi fuit implede come tout autre comen home, mes Edward Roi, son fitz, ordeign qu home sueroit versus Roi per petition, mes unques Roi ne seroit adjudge sinon per eux mesmes et*

lour justices." To this we subjoin a counter-authority from Brooke, *Petition*, Pl. 12 (citing 24 E. 3, fo. 55), where Wilby, speaking of a petition in some cases and a traverse of office in others, "dixit qu'il avera tel brief præcipe Henrico Regi Anglie, et in le lieu de ceo est ore done petition per le prerogative." To this dictum of Wilby, Brooke, C. J., adds, "Quære de tel brief, car videtur quod nunquam fuit lex, car le Roi ne poet escrier ne countermaund luy mesme."

If it was necessary to decide whether the subject had a right to *357] proceed by a settled form of writ called *a præcipe against the King before the petition of right was introduced by Edward the First, we should incline to the negative, for the reason given by Brooke, C. J., and because before and in the time of Edward the First the rights of the people were deriving their origin, after the Conquest, from grants by Royal charters, and were in the course of gradual extension by confirmations of charters by such statutes as the following, viz. *Articuli super Chartas*, for enforcing such charters; the Statute of Petitions, 8 E. 1 (Ryley 442), which, reciting the grievance to the folk who come to the King in parliament by the throng of the petitions, whereof the most part might have been dispatched by the Chancellor and the justices, provides that all petitions which touch the Seal do come first to the Chancellor, and those which touch the Exchequer do come to the Exchequer, and those which touch justices or law of the land do come to justices, and those which touch jewry do come to the jewry's justices: and the Ordinance of Petitions, 21 E. 1, whereby the King ordained that all the petitions which shall be delivered to them whom he has assigned to receive them shall be all at once well examined, and that those which touch the Chancery be set in one, and those that touch the Exchequer in another place, and so with those that touch the justices and those which be before the King and his council severally in another place. From these statutes and ordinances it is clear that many complaints were disposed of by personal application to the King in council: and it is not probable that the subject should have a defined right to a writ against the King, when the rights between subject and subject, and the writs for enforcing them, were in an unsettled state: but, whatever was the form of procedure, the substance seems always to have been the trial of the right of the subject as against the right *358] of the Crown to property or an interest in property which had been seized for the Crown; and, if the subject succeeded, the judgment only enabled him to recover possession of that specified property, or the value thereof if it had been converted to the King's use. The form for trying this question has gone through several changes. Traverse of office found, *monstrans de droit*, and petition of right, were the forms in most frequent use. Amendments of the procedure were made by the statutes 34 E. 3, c. 14, 36 E. 3, c. 13, and 2 E. 4, allowing many questions to be raised by traverse, in cases where theretofore a petition of right was necessary: and much learned discussion is to be found in the books relating to these different forms. Lord Coke has much learning thereon both in his commentary on the statutes for substituting traverse for petition, 2 Inst. 68, and in his judgment in the case of *The Saddlers' Company*, 4 Rep. 58. In *Conyngesby and Mallom's Case*, temp. H. 8, Keilway 154, all the judges

give separate judgments of much research, to the effect that a *monstrans de droit* was wrong in that case, and that the plaintiffs ought to have had a petition. The form of proceeding was much considered; for, the reporter adds that the Chancellor gave judgment for an *amoveas manus* without the advice of any justice or King's counsel, *et hoc contrà legem, ut dicitur*. "*Mes il fuit dit qu'il ceo fist pur ceo que l'office fuit trove per le faux subtiltie de Sir Richard Empson et Audeley en le temps de l'auter Roy, les queux fueront ses hauts et cruels approvers &c.*" In *The Bankers' Case*, 14 State Trials 60, Lord Somers has made an elaborate collection of learning relating to the form of proceedings against the Crown, and adjudged that a petition of right was the proper form for recovering payment of an annuity granted by the Crown. The subject, therefore, has been amply [*359] considered. The authorities are abundant; and we refer to them as establishing strongly the negative proposition that a petition of right does not lie to recover damages from the King for a mere wrong supposed to have been done by him. Not a single instance of a recovery of such damages from the King has been cited.

The force of this negative evidence is increased by many considerations. The occasions for using the remedy, if it existed, were frequent. The right to seize the property of men either outlawed, or attainted, or heirless, would be certain to lead to contested claims, from its unlimited extent. It is probable that wrong would be done by the King's officers enforcing such a right, from its undefined limits; and it is clear that wrongs were so done, from the provisions made for giving redress. As early as Edward the First, in the Statute of Westminster 2 (13 E. 1), *Articuli super Chartas*, c. 18, is an enactment making escheators liable for any wrongs they may do in seizing for the Crown, and, in case of their inability to pay, giving recourse to the superior escheator: and in c. 19, is an enactment, that, after a judgment of restitution, in case of a wrongful seizure, all the issues and profits between the seizure and the restitution should be fully restored. Lord Coke, in his comment on this chapter, says,—“Issues meant profits not paid over; but money once in the King's coffers shall not be restored.” It is likely that such a rule would not prevail, if the question arose now: but we refer to it as showing an improbability of paying unliquidated damages for a wrongful seizure, when the restitution of the profits made by the wrong was so imperfectly enforced.

Throughout these enactments, no mention is made of a remedy against the King for compensation in damages. Against him, the redress to be obtained, is, *restitution only. If damages are [*360] sought, they are to be obtained, if at all, from the officer who did the wrong. Where the question raised by a demurrer to a petition of right was whether the Crown was responsible for negligence in servants employed under the Crown, whereby damage was caused, Lord Lyndhurst decided in the negative: *Viscount Canterbury v. The Attorney-General*, 1 Phillips 321. His words are: “For the personal negligence of the Sovereign, neither this or any other proceedings can be maintained. Upon what ground, then, can it be supported for the acts of the agent or servant? If the master or employer is answerable upon the principle *qui facit per alium facit per se*, this would

not apply to the Sovereign, who cannot be required to answer for his own personal acts." If the master is responsible by reason of his negligence in retaining a careless servant, this principle does not apply to the Sovereign, to whom negligence cannot be imputed. As to damages done by ships of war, the commander is not responsible for damage done by one of the crew, without his participation. "But, if the principle now contended for be correct, the negligence of the seamen in the service of the Crown would raise a liability in the Crown to make good the damage, which might be enforced by a petition of right." He then refers to the authorities, and discusses *Gervais de Clifton's Case*, after mentioned, and decides that the petition of right could not be maintained.

So also, where the chief officer of the marine at Calcutta made an order against employing the steam-tug of the plaintiff, and thereby caused loss, it was held, upon appeal, that no suit could be maintained, for reasons not here revelant: but, in disposing of the question whether the defendant below could justify a wrong under the order of the supreme government, the court says,—p. 237,—“If the *361] act which he did was *in itself wrongful as against the plaintiffs in the court below, and produced damage to them, they must have the same remedy by action against the doer, whether the act was his own, spontaneous and unauthorized, or whether it were done by the order of the superior power. The civil irresponsibility of the supreme power for tortious acts could not be maintained with any show of justice, if its agents were not personally responsible for them.” *Rogers v. Rajendro Dutt*, 13 Moore P. C. 207, 236.

For an example of the liability of the officer in the employ of the Crown for damage caused by him, we refer to the case of *Madrazo v. Willes*, 3 B. & Ald. 353 (E. C. L. R. vol. 5), where the captain of a man of war destroying a Spanish ship wrongfully, but, as he believed, in performance of his duty, was held to be liable to the Spanish owner to the amount of 20,000*l*.

Where the claim was for a sum of money alleged to have been specifically appropriated to the suppliant, and the objection was made that a petition of right was not maintainable for such a claim, the court did not decide against the suppliant on this point, because it had many clear grounds of judgment against him on other points. On this point, the court says: “Considering the length of time that has expired since anything has been practically done in a petition of right, the imperfection of all the authorities, and the obscurity that hangs over this portion of the law, the course that has been taken” (in hearing the case to the end upon the merits and upon form) “can hardly excite surprise, much less should it provoke censure:” *Baron de Bode's Case*, 8 Q. B. 210 (E. C. L. R. vol. 55). If the court entertained so much doubt about allowing the suppliant to proceed when claiming a sum of money said to be specifically appropriated, it probably would have decided without hesitation against a claim for damages for trespass.

*362] *We have said that the suppliant adduced no case in which damages had been recovered against the King for a wrong. He pressed on our attention the case of *Conrad of Colon*, to prove the contrary: but, as we understand it, the case has not that effect. There

the suppliant had joined a Dutchman in sending a cargo of oats to London. They were shipped from Cornwall in the Dutchman's ship: and, when it arrived in London, war had been declared between England and Holland; and the ship and cargo were seized as the property of an enemy: but, as half the cargo belonged to an Englishman, his petition for a restitution of his moiety of the oats would be normal. His claim would be for a specific chattel, not for damages.

On the argument, much reliance was placed on the case of Gervais de Clifton, P. 22 E. 3, fo. 5, pl. 12; and we therefore examine it at length. There, the suppliant suggested that divers trenches and gutters were made in "l'eau de Trent" by the wardens of the castle of Nottingham, whereby his lands were drowned, or inundated ("fur. fondis"), to his damage. This petition was sent to the Chancellor, and by him to an inquisition in due course. By the inquest it was found that the suggestion was true, "et outre que trenches fur. faits en soil" by the wardens, where the King had built four mills: whereupon the suppliant presented a second petition, "*priant restitution de ses damages, et que ceo soit redresse.*" This petition was endorsed to be sent to the Chancellor, that he should send it and the verdict on the inquest to the King's Bench, and that the justices there should cause to come before them the wardens *que ore sont*, et les Serjeants du Roi, et qu'ils feroient droit. The Chancellor sent the tenor of the verdict; and, on objection that he should have sent the verdict, the plaintiff was directed to *bring it if he wished to proceed; and the wardens [*363 were discharged from further attendance: so the proceeding seems to have ended.

The brevity of the report makes it obscure; but, as we understand it, the statement shows a dispute between the owners of a dominant and a servient tenement in respect of the easement of bringing water to a mill. The petition seems to admit a right to the easement, but complains of an excess in the exercise of the right, whereby the lands of the suppliant had been drowned (or inundated), and prays a *restitution* of his damages, and that this should be redressed. The endorsement that the petition should be sent to the King's Bench, and that the wardens for the time being and the Serjeants of the King should attend as parties to the case, shows that an important question of right was in issue; for, the attendance of such persons would be incongruous if the question was, the value of the crops damaged by the water. The report, as it stands, is not, as we read it, a precedent for a claim of damages for a wrong, but a suit to try a right: and, whatever was the claim, nothing was decided in relation thereto. This view of the effect of the report is confirmed by referring to Robert de Clifton's Case (twenty-four years before), Rot. Parl. 18 E. 2, No. 3,—see Baron de Bode's Case, by Anstey, p. 59. We gather from this record that two weirs in the Trent and two watercourses therefrom to the castle mills through the lands of the Clifton family in Waterford, had been made by Robert de Tiptoft, some time warden of the castle, probably in the time of one Gervais de Clifton, to whom Robert succeeded as kinsman and heir; and that turves had been taken from the same lands from time to time to repair and maintain the weir and watercourse. The petition does not deny the right of

*364] the wardens thus to act, but claims compensation, *because, in the exercise of the right, damage was done to the land. In this case also, nothing appears to have been decided; but the question to have been tried, if the case had gone on, was, whether the suppliant should have some compensation. The first petition of right by Robert on his coming to the property is not found; but the commission and inquisition founded thereon show its nature. The commission was to Watton and Wilughby, on the plaint of Robert kinsman and heir of Gervais de Clifton, showing that the wardens had made weirs and trenches through the meadows "which were of Gervais, and unto Robert after his death descended, as in our hand they did exist," and the Trent water out of its right and ancient course had led, whereby the lands circumjacent had oft-times been overflowed, and have dug, and from day to day cause to dig, from the said meadow, turves for the reparation of the weirs and trenches, so that Robert the profit of his meadows in sundry wise doth lose; whereupon he hath prayed relief: whereupon the King, in order that right should be done, wills to be certified how many trenches and weirs had been made, and in what places the water of the Trent had been diverted, and what damages to the said Robert have chanced and do chance yearly, and what profits unto the King and his castle from the trenches and weirs do yearly chance, and by what wardens and out of what cause the trenches and weirs were made; and so directs an inquest to be had. The return of the inquisition shows that two weirs had been made in the Trent and two trenches had been made through the midst of the said meadows, and the Trent water thereby turned out of its right course, whereby the meadows have been inundated; and the wardens have dug turves in the lands for reformation, whereby profits have

*365] been lost; and the damages which have already *chanced to Robert are 15*l.*, and damages do yearly chance to the value of 10*l.*: and they say that the trenches and weirs are to the profit of the King and his Castle to the value yearly of 20*l.*, for, without that watercourse, four of the mills to grind are unable; and that Robert de Tiptoft made the trenches and weirs. The second petition of right, founded on this commission and inquisition, prayed that allowance may be made unto the said Robert of the damages aforesaid; and prayeth the said Robert, if it please the King and his council, that the bailiwick of the honor of Peverell may be assigned to him in recompense for his aforesaid damages. The endorsement on this petition is special, showing that an important interest was in dispute, viz. "for that this thing doth touch the King so highly, and the said inquest is but of office, let there be some great men of the King's council assigned to survey, inquire, and certify the King." We consider that the right is not disputed either in the watercourse or the turbary, because there is no complaint of trespass in digging the trenches or the turves; but there is a hardship or grievance resulting either from an excessive or neglectful exercise of the right, whereby an overflow with damage was caused, for which the suppliant seeks compensation.

In Robert's case, the bailiwick of the honor of Peverell is the recompense proposed. In Gervais's case, the restitution of his damages, and that the overflow may be redressed, is the subject of the prayer. In each case, the petition is for relief from the exaction of servitude

in excess beyond the right of the dominant tenant. Each is in effect a petition that the King would remove his hand from the property of the servient tenant, to the extent of the excess. These cases should be read with the remembrance that neither of them advanced beyond the first stage; and *in neither was there a trial of the contested [*366 facts, or of the law applicable thereto. There may have been a local custom relating to Trent water within the liberty of Nottingham or the honor of Peverell. We find in Domesday, under head "In Burgo Snotingeham,"(a) a trace of a local custom relating to the Trent,—*"In Snotingeham, aqua Trentæ et via versus Eboracum custodiuntur ita ut si quis impedierit transitum navium, et si quis araverit vel fossam fecerit in via Regis infra duas perticas, emendare ht. per viii libras."*(b) There may have been a grant by those from whom the property was demised to the suppliant. We see in Domesday,(c) under head of "Terra Willi. Pevrel"(d) in Snotinghamscire, that he held Wyteford and Clifden(e) and a part of Nottingham borough.(f) There may have been unity of possession, severed when the Crown became possessed of the honor of Peverell, of which Robert de Clifton desired to obtain the bailiwick; and the right to take the water and the turves may have been subject to the duty of making compensation for any damage caused by the exercise of the right.

We refer to these matters of conjecture consistent with the facts as they are stated in the cases; and, on the review, we come to the conclusion that principle and authority coincide in showing that a petition of right lies not to recover unliquidated damages for a *mere [*367 wrong, and that neither of the cases of the Cliftons is an authority for a contrary conclusion: and we adopt Lord Lyndhurst's remarks in Lord Canterbury's Case, 1 Phillips 326, as confirmatory of this conclusion. He remarks that Gervais's Case went off because the tenor of the verdict and not the verdict itself had been returned to the King's Bench,—a defect easily cured if the claim could be supported, but it does not appear to have been renewed; and that the complaint of a similar grievance to the same property by the wardens of Nottingham Castle in the 18 E. 1, and a prayer for the favour of an appointment to be steward, indicated that the wardens had a right to bring the water to the Castle mills, and did what was complained of in exercise of a right; and that the complainant was not demanding a right, but begging some gift on account of a hardship suffered by him.(g)

(a) Vol. 1, p. 280.

(b) "In Nottingham, the water of Trent, and the fosse, and the way towards York, were kept so that, if any should hinder the passage of boats, and if any should plough or make a ditch in the King's way, within two perches, he should make an amends by eight pounds." Dr. Thoroton's Antiquities of Nottinghamshire, p. 2.

(c) Vol. 1, p. 287.

(d) Natural son of William the Conqueror.

(e) "Wilesforde Soca and Cliftun."

(f) Dr. Thoroton's Antiquities of Nottinghamshire, p. 488.

(g) In Dr. Thoroton's Antiquities of Nottinghamshire, p. 52 et seq., is a history and pedigree of the Clifton family. It is there said that Sir Gervais de Clifton in 22 E. 3 "got a jury to inquire what damages he sustained by reason of certain trenches made in Robert de Tibtot's time to bring the water of Trent out of the ancient course to Nottingham Castle, for the benefit of the King's mills there, through Milford meadows, and the jury found 100*l.*, whereof he prayed 52*l.* 7*s.* 0*d.* ob. q. might be to satisfy his arrearages when he was last sheriff, and the

To these reasons and authorities we would add our opinion that there is good ground for maintaining that which we find to be the law on this subject. If each of the Queen's subjects who believed he *368] had been at any time, in any reign, wronged in the *administration of civil or military affairs, could sue the Sovereign for the time being for the amount at which he might estimate his damage, the extent of pernicious result would be great. And we refer to the abstract of the petition of right adduced in evidence in *Irwin v. Sir George Grey*, 3 Fost. & Fin. 635, as an example of the mischief that might arise if such was the law. By that petition the suppliant in 1861 sought compensation for a series of alleged wrongs in the course of legal proceedings beginning in 1834, wherein he was convicted of a misdemeanor in representing that an assistant-barrister had resigned, and a Mr. Johnston was acquitted in a prosecution of perjury instituted by Mr. Irwin. The wrongs imputed, were, withholding from the juries certain letters; and the guilt of those wrongs was imputed to Mr. Lyttleton, Lord Morpeth, and Lord John Russell, secretaries for Ireland, and the Attorney-General and the Crown Solicitor in Ireland at the time respectively. The question to be tried would have been whether the wrongs were committed, so as to damage the suppliant, that is, in effect, to try in 1861 whether some verdicts returned in 1834-5 were right, and, if not, whether Her present Majesty should compensate Mr. Irwin for the damage sustained in paying costs and in being imprisoned and fined, and also in being disinherited by his father, by paying to him 100,000*l.*, or so much thereof as the jury might give.

Upon each of the three grounds above mentioned our judgment is for the Crown.

The result has the sanction of all my learned Brothers who heard the argument; but I am desirous of adding that some of the reasons have not the concurrence of my much respected Brother Willes.

Judgment for the Crown.

rest paid him. His father, the last-named Robert, cousin and heir of the former Sir Gervais, had petitioned King Edward 2, and had an inquisition taken before Roger de Verdon, lieutenant of John de Segrave, warden of Nottingham Castle, but he had order only for 30 and 5*l.* out of the Exchequer.

*369] *PHILIP CHARLES SHEPPARD and Others, Appellants;
The Churchwardens and Overseers of the Parish of BRADFORD, in the County of WILTS, Respondents. *May 2.*

A reformatory established under the provisions of the statutes 17 & 18 Vict. c. 86, 18 & 19 Vict. c. 87, 19 & 20 Vict. c. 109, and 20 & 21 Vict. c. 55, is not rateable to the relief of the poor,—though a part of its support is derived from weekly payments contributed by the parents of the inmates, and part from the proceeds of work done by the inmates,—washing, mangling, and needlework,—for strangers.

THE respondents, by a rate made for the relief of the poor of the parish of Bradford, in the county of Wilts, on the 3d of July, 1863, assessed the appellants, under the name of "The Reformatory Committee at Limpley Stoke," in the sum of 2*l.* 16*s.* 3*d.*: and the appel-

lants duly gave notice of appeal, in which the following are set forth as the grounds of such appeal:—

“First, that the said premises are not liable to be rated.

“Secondly, that the appellants are not liable to be rated in respect of the said premises.

“Thirdly, that they are not beneficial occupiers of the said premises.

“Fourthly, that they make no profit of the said premises.

“Fifthly, that all the funds arising from the said premises are applied to public and charitable uses, in common with such premises.

“Sixthly, that the said premises are a reformatory school for the better training of juvenile offenders, under an act passed in a session of parliament holden in the 17th & 18th years of Her present Majesty (c. 86), intituled ‘An act for the better care and reformation of youthful offenders in Great Britain,’ and duly certified according to law.”

It was agreed that the facts should be stated for the opinion of the court, pursuant to the 11th section of the 12 & 13 Vict. c. 45, and an order was made accordingly by consent.

*The facts were, that the premises in respect of which the rate was made were a reformatory school for young female [*370 offenders, instituted in pursuance of the 17 & 18 Vict. c. 86 and other statutes in that behalf made, and duly certified according to law as such, and for no other purpose.

The appellants were the managing committee of that institution. They do not reside on the premises; but the matron and other officers of the reformatory do reside there.

The reformatory in question, with a piece of land attached, is rented by the appellants at the annual rent of 74*l.*; but none of them reside there. It is situated in the parish of Bradford, in the county of Wilts, and is capable of accommodating fifty girls, although there never has been so large a number of inmates. Offenders from all parts of the kingdom may be and are sent to this reformatory, though it was intended for the counties of Wilts, Somerset, and Gloucester, and three beds were always retained for girls from the borough of Bath; but, of the forty-three girls now under detention, four only are from these counties, and one from the borough of Bath. On admission, entrance-fees are payable, which are paid into the general fund of and applied towards the maintenance of the institution; and these fees for the year 1862 amounted to the sum of 22*l.* 12*s.* In many instances also the parents are obliged, under the statutes 18 & 19 Vict. c. 87 and 20 & 21 Vict. c. 55, to contribute towards the maintenance of their children whilst in the reformatory; which payments are, however, deducted from the amount allowed by government. These payments during the year 1862, amounted to 25*l.* 2*s.* 3*d.* The girls are instructed in reading, writing, ciphering, and religious knowledge, and are also engaged in various industrial occupations. They *make up their own clothes, do the washing and other work [*371 of the house, help in cooking, and some of the gardening: mangling, washing and needlework, not only of the reformatory, but for private families, are done on the premises; and, during the year 1862, as appears by the report of the committee, the sum of 28*l.* 5*s.* 9*d.* was credited to the funds of the institution as the value of the washing and needlework done by the girls; nearly the whole of which

work was performed during the last four months of the year, since which time extensive alterations have been made in the premises, which will enable mangling and washing to be carried on much more extensively. Such work is stated to be done on reasonable terms; and the committee (the appellants) express a hope of ultimately making the reformatory self-supporting, with the aid received from government.

All the funds derived from work done on the premises are applied towards the maintenance of the institution, or for rewards to the inmates for proficiency and good conduct. The remainder of the income of the reformatory for the year 1862 (such income amounting to 920*l.* 16*s.* 1*d.*) was made up of donations, subscriptions, government grant, and sundries; the whole of which was applied solely to the maintenance of the reformatory, or placed in banks to meet contingencies of the present year, and which has since been expended in the maintenance of the institution.

The question for the opinion of the court was, whether the reformatory in question was liable to be rated for the relief of the poor.

David Keane, Q. C. (with whom was *Douglas Brown*), for the respondents.^(a)—The establishment in *question is liable to be *372] rated. It is in the nature of a private charity. The subject recently underwent much consideration in the case of *The Queen v. Inhabitants of Stapleton*, 33 Law J., M. C. 17, where a school for the maintenance and education of poor boys was held not to be exempt from rating. *Blackburn, J.*, in delivering the judgment of the court, there says:—"It is now settled, that, where lands are occupied for public purposes, as, for instance, as court-houses, *prisons*, and the like, so that,—to adopt the language of the court in *The Queen v. The Wallingford Union*, 10 Ad. & E. 259, 2 P. & D. 226,—'the public is the occupier, whilst those who would otherwise have been the occupiers are in the situation of public servants, receivers, and managers for the public benefit, without any interest of their own,' there can be no rate imposed; for, the rate must be upon the occupier, and the occupier in such cases, the public, cannot be rated. But, in the present case, it cannot be said that the purpose for which these premises are occupied is public in any sense of the word. They are occupied for the purpose of a highly laudable charity, but one of a strictly *private* nature. The recipients of the charity would themselves be rate- *373] able if they had an exclusive *occupation,—*The King v. Green*, 9 B. & C. 230 (E. C. L. R. vol. 17), 4 M. & R. 164." In *The Queen v. The Licensed Victuallers' Society*, 1 Best & Smith 71 (E. C. L. R. vol. 101), the Licensed Victuallers' Society were held to be

(a) *Keane* had proceeded a considerable way in his argument before it was discovered for which party he appeared. He was then informed that the invariable practice of this court was for the *appellant's* counsel to begin. In answer to this, he referred to the case of *The Justices of Bedfordshire, app., The Churchwardens and Overseers of the Poor of St. Paul, Deptford, resp.*, 7 Exch. 650, where it was held by the Exchequer, that, on the hearing of a special case in an appeal stated for the opinion of one of the superior courts under the 11 & 13 Vict. c. 45, s. 11, the counsel for the party in support of the rate is entitled to begin. But the court said, that, whatever the course pursued in this respect elsewhere, they would adhere to the practice established here in *all* cases of appeal. As, however, *Keane* had proceeded so far, he was allowed to go on; but without the privilege of a reply.

rateable in respect of their school at Kennington, they having a beneficial occupation of the premises. In the course of the argument there, Hill, J., observes,—“I do not agree that there is no distinction between buildings used for *charitable* and buildings used for *public* purposes. In the former, there is an actual occupier; in the latter there is not.” That is strictly a case of a charity, founded for the benefit of a particular class. *The Queen v. Temple*, 2 Ellis & B. 160 (E. C. L. R. vol. 75), which is there referred to, is closely analogous to the present case. There, lands were purchased by the commissioners of the Treasury on behalf of the committee of council for education, for the purpose of establishing a normal and model school, and were conveyed to a trustee for them. The premises were occupied as a normal school. A principal and masters were appointed, who resided on the premises. Part of the lands were let, and the proceeds, together with the annual payments for the scholars, were carried to the general funds of the school, but were not sufficient to defray the expenses; and the deficiency was made good by the committee of council, out of the money voted by parliament for the promotion of public education. It was held that the premises were liable to the poor-rate, as there was a beneficial occupation; and that, though the premises were occupied for a *public* purpose, and the expenses were defrayed out of the public revenue, those circumstances did not afford a ground of exemption. Lord Campbell, in giving judgment, there says: “We have here a house and land producing profit, and beneficially occupied. The institution is not of such a charitable nature as to bring it within the class of cases beginning with *Rex v.* [*374 *Waldo, Cald. 358: and, although the purposes may be of a public and very laudable character, this consideration alone will not exempt corporeal hereditaments from liability to be assessed to the relief of the poor, even where the furtherance of education and religion is in view; for, there is no power, as yet, conferred on an individual to compel the rate-payers of the parish in which he wishes to found such an institution to contribute to it against their inclination. It might have been well if the dedication of real property to purely *charitable purposes* had not exempted it from rateability, and if the trustees of the charity had taken it subject to its former burdens, instead of the founder being munificent at the cost of others. This appears to have been considered as law in the time of Lord Holt, who says,—‘Hospital lands are chargeable to the poor as well as others; for, no man, by appropriating his lands to an hospital, can discharge or exempt them from taxes to which they were subject before, and throw a greater burthen upon their neighbours.’ *Anon.* 2 Salk. 527. At present we think it must be taken as settled, that a house or land applied to purely charitable purposes, in the common acceptation of that term, and occupied only by the objects of the charity, or in furtherance of the charitable purpose, without profit being derived from it to any one, is exempted from rateability. But, if the land and houses produce profit which is not entirely so applied, the occupiers are rateable, although they apply it to purposes beneficial to the public, unless the benefit is enjoyed by all who contribute to the poor’s rate, and by them exclusively.” [BYLES, J.—That observation of Lord Holt, in 2 Salk. 527, has been very much

reflected upon.] This institution is not within any of the recognised exemptions. [BYLES, J.—In what does it differ from an ordinary *375] gaol?] It is an *establishment maintained through the benevolence of private individuals for the reformation of juvenile offenders: it is only a particular form of private charity, to which for good political and moral reasons the government lends some aid. [KEATING, J.—Could the managing committee release any of the inmates before the expiration of her sentence?] It is apprehended they could not. But it is equally clear that they could not be compelled to continue to keep up the establishment. [ERLE, C. J.—I find nothing in any of the statutes to indicate either permanent dedication or power to abandon. But, once established, I cannot conceive that it could be suddenly abandoned.(a)] This is not very material, seeing that the rate must be prospective. So strict is the rule, that, where a commanding-officer in barracks had apartments allotted to him for the use of his family, beyond the requirements for his necessary accommodation for the purpose of the public service, he was held to be rateable: *The King v. Terrott*, 3 East 506. [ERLE, C. J.. referred to *Gambier v. The Overseers of the Parish of Lydfeld*, 3 Ellis & B. 346 (E. C. L. R. vol. 77). Reformatories may be classed under buildings used for the administration of the power of the law.(b) The key of the gaoler and the bayonet of the soldier are equally instruments used for the public service.] The establishment in question is a place where a gainful trade is carried on in washing, mangling, and *376] needlework: and the *managing committee or trustees are by their officers and servants the occupiers.

T. W. Saunders, for the appellants.(c)—The institution in question is exempt from rateability upon two grounds,—first, because it is a charitable institution,—secondly, because it is entirely devoted to the public service. 1. In *Rex v. Waldo*, Cald. 358, 1 Bott 182, it was held that an almshouse wholly occupied by objects of charity or their attendants, and of which no profit was made, had no rateable occupier. Lord Mansfield, in giving judgment, says:—"Mr. Waldo makes no profit of this building; and it is sufficient that this is so in fact, and the profit is here in fact applied to public and charitable purposes." That doctrine has been recognised in all the subsequent cases. [BYLES, J.—It has been very much doubted of late.] If used entirely for charitable purposes, the building is not rateable: it was so held in the cases of *St. Bartholomew's Hospital*,(d) *Bethlem Hospital*,(e) *St.*

(a) The 7th section of the 17 & 18 Vict. c. 86, vests in the Home Secretary a power of removal,—“It shall and may be lawful for Her Majesty's secretary of state for the home department, if he shall think fit to do so, to remove any such youthful offender from one reformatory school to another: Provided always that such removal shall not increase the period for which such offender was sentenced to remain in a reformatory school.”

(b) See *The Queen v. The Justices of Worcestershire*, 11 Ad. & E. 257 (E. C. L. R. vol. 39), 3 P. & D. 8.

(c) The points marked for argument on the part of the appellants were as follows:—

“1. That the appellants are not beneficial occupiers of the premises in question:

“2. That the said premises are used and occupied wholly for public and charitable purposes, being a reformatory for juvenile criminals, established and regulated under the provisions of the statutes 17 & 18 Vict. c. 86, 18 & 19 Vict. c. 87, 19 & 20 Vict. c. 109, and 20 & 21 Vict. c. 55.”

(d) *Rex v. St. Bartholomew's the Less*, 4 Burr. 2435, 1 Bott's P. L. 139.

(e) *The Queen v. St. George, Southwark, In re Bethlem Hospital*, 10 Q. B. 852 (E. C. L. R. vol. 59).

Luke's Hospital,(a) The London Missionary Society,(b) and The Baptist Missionary Society.(c) In *The Queen v. Wilson*, 12 Ad. & E. 94, 4 P. & D. 130, the *ground upon which the decision is [*377 put, is, that "no person connected with the society derived any pecuniary profit or personal emolument from their occupation of the premises." In *The Queen v. The Inhabitants of Stapleton*, 33 Law J., M. C. 17, the ground of the decision was, that the institution was a mere *private* charity. That cannot be said here: nor can it be said that there is any beneficial occupier. [*Keane* referred to *The King v. St. Giles's, York*, 3 B. & Ad. 573 (E. C. L. R. vol. 23), where trustees of a lunatic asylum were held to be rateable.] That was the case of a private charity; and the building produced a profit,—from affluent persons being received there,—though the trustees derived no personal benefit. *The Queen v. Temple*, 2 Ellis & B. 160 (E. C. L. R. vol. 75), which is so much relied on for the respondents, was not the case of property devoted to purely charitable purposes: some profit was made from the payments by the pupils: and Lord Campbell's judgment entirely sustains this argument.

2. Then, this building is exempt from rateability on the ground that it is a public institution,—a public prison,—open to the whole kingdom. It has all the attributes of a public prison; the only distinction between it and an ordinary county gaol being, that the management of this establishment is confided to those benevolent persons who originated it, instead of to a public functionary. It is a prison without the penal discipline enforced in ordinary prisons. No one but the Home Secretary has power to discharge an offender (17 & 18 Vict. c. 86, s. 2); and one absconding may be sent to any gaol or house of correction, with or without hard labour, for any period not exceeding three calendar months: s. 4. The rateability of buildings used as ancillary to gaols or houses of correction was considered, and negatived in the case of *The Queen v. Shepherd*, 1 Q. B. 170 (E. C. L. R. vol. 41), 4 *P. & D. 534, and the Justices of Bedfordshire v. *The Churchwardens and Overseers of the Parish of St. Paul, Deptford*, 7 Exch. 650. [*378

ERLE, C. J.—Considering the statutes under which these reformatories are established and regulated, and the purposes to which they are devoted, it seems to me that they are as much used for public purposes as county gaols or houses of correction. The distinction between prisons for the confinement of adult offenders and reformatories for juvenile delinquents is too fine to have any effect upon the liability to be rated. A gaol or house of correction is exempted from rating because it is a building applied to public purposes. A reformatory for the detention and care of youthful offenders is equally in effect a gaol applied to the purposes of public justice. If the one is exempt from rateability, I can see no reason why the other should not also be exempt.

WILLES, J.—I am of the same opinion. The occupation of the building in question is for public purposes,—purposes in which the whole of the public are peculiarly interested.

(a) *The King v. St. Luke's Hospital*, 2 Burr. 1053, 1 W. Bl. 249.

(b) *The Queen v. Wilson*, 12 Ad. & E. 94 (E. C. L. R. vol. 40), 4 P. & D. 130.

(c) *The Queen v. The Baptist Missionary Society*, 10 Q. B. 884 (E. C. L. R. vol. 59).

BYLES, J.—I am of the same opinion. No doubt there are occupiers here in the strict legal sense of the term occupier, as, one who is qualified to maintain an action for a trespass. But the occupation mentioned in the statute of Elizabeth, is, a beneficial occupation, either to the party himself or as trustee for others. No statute binds the Crown unless specially mentioned therein. Buildings devoted to the service of the public, as the Horse Guards, the Admiralty, courts of justice, county gaols, and the like, are exempt from rateability on *379] this ground. This establishment clearly *falls within the latter class. The persons there confined are confined under public sentence, and a public duty is imposed upon those having the care of them to retain them in custody: and I see no reason why these establishments should not fall within the ordinary category of county gaols. It is unnecessary to consider whether this is not a public charity, and on that ground also exempt. The case of *The Queen v. The Inhabitants of Stapleton*, 33 Law J. M. C. 17, very properly distinguishes between buildings devoted to the purposes of a public charity, and those which are supported by private benevolence. In *Rex v. Waldo*, Cald. 358, an almshouse was held not to be rateable. So, in *The Queen v. Wilson*, 12 Ad. & E. 94 (E. C. L. R. vol. 40), 4 P. & D. 130, the premises of the London Missionary Society,—a society founded entirely for religious and charitable purposes, and supported by voluntary contributions,—were held to be exempt. I am aware that observations have been made, and perhaps rightly made, upon cases of that nature. But this is a charitable institution for public purposes, confined to no particular sect,—as public at least as the hospitals of St. Bartholomew and St. Luke, as to which a principle has been laid down which cannot now be disturbed. The case of churches and chapels has not been adverted to. As to these there is a special provision in the 3 & 4 W. 4, c. 30; though it is a mistake to suppose that their exemption from rateability depends upon that statute: it had before been decided that such edifices devoted to the public and all-important purpose of Divine worship, were not rateable where no pew-rents or other profits were received from them: see *Robson v. Hyde*, Cald. 310, 1 Bott 181; *The King v. Woodward*, 5 T. R. 79; *The King v. Agar*, 14 East 256. It is unnecessary, however, as I before observed, to consider this point. I agree with my *380] Lord *and my Brother Willes that this establishment for the detention, punishment, and reformation of youthful offenders, is exempt from rating, as a building devoted to public purposes.

KEATING, J.—I am of the same opinion, upon the ground that this is substantially a prison, which is sufficient to distinguish this case from all those relied on by Mr. Keane. It is unnecessary to speculate upon the probable duration of the institution. Whilst it remains devoted to its present use, it is a public prison.

Appeal allowed, without costs.(a)

(a) See the 15th section of the 17 & 18 Vict. c. clxix., an act for the provision, regulation, and maintenance of county industrial schools in Middlesex.

JACKSON *v.* GRIMLEY. *April 15.*

A., who resided at West Bromwich (within the jurisdiction of the Staffordshire county-court), being the holder of a promissory note of B.'s testator for 100*l.*, sent his collector to B., who resided at Birmingham (within the jurisdiction of the Warwickshire county-court), to demand payment or security. B. (at Birmingham) *consented to give A. a further charge* upon some property there on which he already held a mortgage for 200*l.*, and the collector (either at the request or with the assent of B.) went to C., a solicitor at West Bromwich, by whom the original mortgage had been prepared, and there gave him instructions to prepare the necessary security, which B. afterwards executed at West Bromwich.

C. afterwards sued B. in a superior court for his charges, and obtained a verdict for 6*l.* 15*s.* 4*d.*:—Held, that the cause of action arose "in some material point" within the jurisdiction of the Birmingham county-court, and consequently there was not concurrent jurisdiction within the 128th section of the 9 & 10 Vict. c. 95, so as to entitle C. to his costs.

THIS was an action by the plaintiff, an attorney at West Bromwich, to recover a bill for 6*l.* 15*s.* 4*d.*

It appeared that, in 1859, one Johnson, of West Bromwich, had advanced a sum of 200*l.* to one Edward Grimley, an innkeeper, of Birmingham, upon a mortgage of a piece of land, malt-house, cottage, and premises at Aston, near Birmingham; that Edward Grimley *died in July, 1862, having by his will appointed his wife, [*381 the now defendant, and one Dobbins, executrix and executors thereof; that, prior to the testator's decease, Johnson had made him a further advance of 100*l.*, the only security for which was a promissory note; that, in February last, one Averill (who collected Johnson's rents), at the request of Johnson, called upon the defendant and his co-executors at Birmingham, and told them that Johnson insisted upon having the 100*l.* paid or secured by a further charge upon the property already in mortgage to him; that it was then arranged that a further charge should be prepared; and accordingly Averill,—whether acting in the matter as the agent of Johnson or of the defendant was matter of controversy,—called upon the plaintiff at West Bromwich, and there gave him instructions to prepare the necessary security at the expense of the defendant; that the defendant afterwards called with Averill at the plaintiff's office at West Bromwich, and there consulted the plaintiff's managing clerk upon the subject of the further security; that the deed was executed there; and that this action was brought to recover the plaintiff's charges for preparing the security.

At the trial before the undersheriff of the county of Stafford, the plaintiff obtained a verdict for the amount of his claim.

Upon an affidavit stating the above facts, and further stating, that, "at the time of the commencement of the action, the defendant resided, and still resides, at Birmingham, in the county of Warwick, and within the district of the county-court of Warwickshire holden at Birmingham, and that the cause of this action did not arise wholly or in some material point within the jurisdiction of the said last-mentioned court,

H. Matthews, in Hilary Term last,—after a previous *unsuc- [*382 cessful application to Byles, J., at Chambers,—obtained a rule calling upon the defendant to show cause why the plaintiff should not have his costs, on the ground that the superior court had jurisdiction in this case. He submitted that the whole cause of action arose at

West Bromwich, where the retainer was given and the deed executed, and no part of it in Birmingham. He referred to Story's Conflict of Laws, § 285, and to *Pattison v. Mills*, 1 Dowl. & Clark 342, and *Norman v. Marchant*, 7 Exch. 723.(a)

Giffard now showed cause.—The question is, whether the 128th section of the 9 & 10 Vict. c. 95, gives concurrent jurisdiction to the superior court under the circumstances stated in these affidavits: in other words, whether the cause of action "arose wholly or in some material point within the jurisdiction of the court within which the defendant dwelt or carried on his business at the time of the action brought." The facts are shortly these:—The defendant (who resided *383] at Birmingham) was one of the executors of one Edward *Grimley, deceased, and as such had to provide for the payment of a promissory note for 100*l.* which was held by one Johnson. Johnson, requiring further security, sent Averill, who was his general agent for the collection of moneys due to him, to the defendant with instructions to demand payment or security. Averill accordingly went to Birmingham and there saw the defendant, who consented to secure the 100*l.* by a further charge upon some property belonging to the testator which was already in mortgage to Johnson, and Averill, either at the request or with the assent of the defendant, went to West Bromwich, and there gave instructions to the plaintiff, the solicitor by whom the deed on the occasion of the former mortgage was prepared, to prepare a further charge on the same property. This was done, and the deed was subsequently executed by the defendant at West Bromwich. Under these circumstances, it is submitted, the whole cause of action did not arise in West Bromwich, but that it arose "in a material point" in Birmingham. On the other side it is contended that the whole cause of action arose in West Bromwich; but Averill's own affidavit shows that the authority to retain the plaintiff to prepare the deed was given in Birmingham. "Material point," in the statute, means a material part of the transaction out of which the cause of action arises: *Grimbley v. Aykroyd*, 1 Exch. 407, 3 D. & L. 701.(b)

H. Matthews, in support of his rule.—In giving the plaintiff instructions to prepare the security in question, Averill was acting for the defendant only. With the defendant's authority he went to the plaintiff's office at West Bromwich, and there retained the plaintiff to *384] prepare it. Whether Averill's authority was received at Birmingham or elsewhere, is perfectly immaterial: what passed there was no part of the cause of action. [BYLES, J.—Suppose the

(a) There, the plaintiff and defendant, who dwelt less than twenty miles apart, entered into a written agreement, by which the former engaged to supply the latter with goods of a certain quality and at a specified price. After the delivery of a portion of the goods, the defendant refused to take the remainder, on the ground that they were not of the quality agreed upon. The plaintiff thereupon sued the defendant in one of the superior courts, to recover the amount of the goods so delivered, and at the trial he gave in evidence the written agreement, and recovered a verdict for the amount of the goods supplied, at the price stated in the agreement. This agreement was executed by both parties at a place within the jurisdiction of a court within which the defendant dwelt at the time of action brought, and the amount recovered was below 20*l.* :—It was held that this was not a case in which the superior court had concurrent jurisdiction, and therefore that the plaintiff was not entitled to costs.

(b) And see *Wood v. Perry*, 3 Exch. 442, 6 D. & L. 194, and *Bonsey v. Wordsworth*, 18 C. B. 325 (E. C. L. R. vol. 86).

authority had been to execute a deed,—which must be conferred by deed,—would not the execution of the deed giving the authority be a material part of the transaction?] Probably it would. In *Guard v. Hodge*, 10 East 32, where the venue in an action of crim. con. had been changed from Middlesex to Devon, upon the usual affidavit that the “whole cause of action,” if any, arose in Devon, and not elsewhere out of that county, a rule to restore the venue to Middlesex, upon an affidavit that “the marriage of the plaintiff with his wife was had in Ireland,” was discharged,—Lord Ellenborough saying: “The rule for changing the venue having been made on the usual affidavit, that the whole cause of action arose in the county of Devon and not elsewhere, makes it necessary to consider what is the whole cause of action in this case. Now, that is the trespass committed on the wife; and the proof of the marriage of the plaintiff, though necessary to entitle him to recover for the injury complained of, is no part of the cause of action.” So, here, the consent of the defendant to give the security, is not any part of the cause of action. The plaintiff was retained at West Bromwich. Dr. Story, in his *Conflict of Laws*, § 285, puts this case:—“A merchant in America orders goods to be purchased for him in England. In which country is the contract to be deemed complete, and by the laws of which is it to be governed? *Cassaregis* (Disc. 179, § 1, 2) has affirmed that in such a case the law of England ought to govern; for, there the final assent is given by the person who receives and executes the order of his correspondent. He goes on to illustrate the doctrine by putting the case of a merchant directing his correspondent in a foreign [*385 *country to buy goods for him; in which case, he says, if the correspondent accept the order, and in the execution of it he buys the goods of a third person, two contracts spring up,—the first of mandate between the principal and his agent, and the second of purchase and sale between the vendor and the agent as purchaser in the name of the principal; and both are to be deemed contracts made in the place where the agent resides. This doctrine, so reasonable in itself, has been expressly affirmed by the supreme court of Louisiana (in *Whiston v. Sleddon*, 8 Martin, R. 93). It has also received a sanction in a recent case in the House of Lords (*Pattison v. Mills*, 1 Dowl. & Clark 342 (a)), where the Lord Chancellor (Lyndhurst) said ‘If I, residing in England, send down my agent to Scotland, and he makes contracts for me there, it is the same as if I myself went there and made them.’” [ERLE, C. J.—The defendant never wished to have a mortgage-deed executed. Johnson got Averill to apply to the defendant for it. The defendant consented: and Averill was the channel through which that consent was conveyed to Jackson. The known usage is, that the mortgagor pays all the expenses of the mortgage.] The right of the plaintiff to bring this action arose solely out of the retainer by Averill at West Bromwich. And there is no pretence for saying that Averill had any authority from Johnson to employ the plaintiff to draw the security.

ERLE, C. J.—I am of opinion that a material part of the cause of action here arose in Birmingham. It seems that Johnson employed

Averill, his general agent, to get in a debt which was due to him from the defendant (as executor), who resided in Birmingham, or security; and that Averill, acting for Johnson, having seen the defendant and arranged with him for a further security, went to the *386] plaintiff at West Bromwich, and *employed him to prepare it. There was no promise by the defendant to the plaintiff to pay him for the work; but the general custom is so. I think it was a material part of the cause of action, that the defendant consented to become a mortgagor. This is not like the case of a traveller sent out by a wholesale house to solicit orders. The rule must be discharged.

WILLES, J., concurred.

BYLES, J.—I am of the same opinion. If Averill was Johnson's agent, the whole contract was made at Birmingham. If he were the defendant's agent, then the authority to employ the plaintiff was given in Birmingham. Upon this point, there is a conflict upon the affidavits which it is difficult to reconcile. But, be it contract or be it authority, the consent of the defendant to become mortgagor was given at Birmingham. That is sufficient to establish that the cause of action "in some material point" arose in Birmingham.

KEATING, J., concurred.

Rule discharged, with costs.

*387] *MADDICK and Another v. MARSHALL. April 16.

The provisional directors of a projected joint-stock company resolved at a meeting that the company should be advertised in several newspapers, and directed their secretary to take the necessary steps for that purpose. The secretary accordingly applied to an advertising agent, to whom (on his calling at the company's offices to inquire under what authority the secretary was acting) *he showed the prospectus and the above resolution* :—

Held, that the directors who were parties to the resolution were responsible for the cost thereby incurred,—notwithstanding they had been induced to allow their names to appear as directors upon the faith of the secretary's assurance that all preliminary expenses would be provided for by him, and that they would incur no liability,—there being nothing to show that the secretary, in giving the orders, or in communicating to the advertising-agent the resolution of the directors, had acted beyond the scope of his actual or apparent authority as secretary.

THIS was an action by the plaintiffs, advertising-agents, for work and materials and money paid for the use of the defendant in causing advertisements to be inserted in divers newspapers.

The defendant pleaded never indebted.

The cause was tried before Erle, C. J., at the last Assizes at Kingston, when the following facts appeared in evidence :—Early in 1863, one Allan, who possessed a considerable tract of land at Adelaide in South Australia, was desirous of forming a company for the construction of a railway, docks, and wharfs, to be called "The Adelaide (North Arm) Port and Railway Extension and Land Company, South Australia (Limited)." In furtherance of this object, he had a communication with one Payne, a gentleman who had had some experience in the getting up of joint-stock companies, and ultimately agreed with him that Payne should take all the steps necessary for forming a company, receiving for his services 10,000*l.* out of the first moneys received for deposits, out of which he was to pay all the preliminary expenses. Payne accordingly took offices in London, appointed a

solicitor and an engineer, and induced several gentlemen,—the defendant amongst others,—to consent to act as provisional directors; telling them that they would incur no liability, inasmuch as all the preliminary expenses would be paid either by Allan or himself. The solicitor of the proposed company told the parties they might safely rely on this statement; and both he and the engineer assured them that they would not look to them for their *charges. The directors [*388 were to have the requisite qualification in paid-up shares. Payne then prepared a prospectus describing the capital of which the proposed company was to consist, the number of shares, the officers (himself as secretary), and other matters. A meeting of the directors took place on the 2d of April, at which they were again told by Payne, in the presence of the solicitor of the proposed company, and of the engineer, that they would not be liable for any of the expenses. The prospectus was laid before this meeting, and the names of the provisional directors (including that of the defendant) were inserted therein; and the following resolution was proposed and agreed to by all of them:—

“That it is inexpedient to advertise the company pending the Easter holidays, but that the prospectus of the company be forwarded to the daily papers, with a request to announce its issue, and that the prospectus be advertised in the necessary newspapers on Wednesday next, the 8th instant, and that, in the meantime, it be distributed and circulated by post and otherwise to such persons as are likely to become subscribers of capital.”

The minutes of this meeting were signed by the defendant, who acted as chairman.

A further meeting was held on the 2d of June, at which the defendant again acted as chairman, when the following resolution, amongst others, was agreed to:—“That the prospectus be finally settled and revised by a committee consisting of Mr. Marshall” (the defendant) and other persons named, “with power to deal with any matters connected therewith, and that, when approved by them, the prospectus be printed and forthwith advertised.”

Shortly afterwards, Payne applied to the plaintiffs to cause the advertisements to be inserted in the several *newspapers; and, [*389 upon their calling at the company's office and asking him by what authority he acted in the matter, Payne showed them the prospectus and the above resolutions. Upon the faith of these, the plaintiffs proceeded to insert the advertisements, and continued them for a considerable time, until the provisional directors, finding that the scheme found no favour in the market, resolved that they should be discontinued.

The plaintiffs sent in their bill to Payne, charging the company; but, not being able to obtain payment, and Payne having become bankrupt, they brought their action against the present defendant.

On the part of the defendant it was submitted that there was no evidence to fix him with liability, he having given Payne, the secretary, no authority to pledge his credit to the plaintiffs for advertisements which formed part of the preliminary expenses to be borne by Payne himself.

His Lordship, however, thought there was evidence for the jury,

and he accordingly left the case to them in a manner which was not much complained of, and they returned a verdict for the plaintiffs,—the amount to be referred.

Lush, Q. C., in pursuance of a qualified leave reserved to him at the trial, now moved for a nonsuit.—The only authority given by the directors to Payne, was, an authority to disburse his own money for the insertion of advertisements in the newspapers, not to pledge their credit to a third person for that purpose. [BYLES, J.—The resolution of June 2d, which was shown to the plaintiffs, does not disclose the fact that Payne was to bear all the preliminary expenses.] That resolution was shown to the plaintiffs without the defendant's authority. [ERLE, C. J.—The jury thought the directors held out Payne *390] as having authority; and, if so, the *defendant was liable.] There was no holding out with the assent of the defendant. The plaintiffs saw nothing but the prospectus and the resolution, which Payne had no authority to show them. That the mere insertion of the defendant's name in the prospectus as a provisional director would not render him liable for work done upon the order of the secretary, is clear from *Reynell v. Lewis* and *Wild v. Hopkins*, 15 M. & W. 517, *Wilson v. Curzon*, 15 M. & W. 532, and numerous other cases. It cannot be supposed here that the directors intended to authorize the secretary to do anything to charge them, seeing that their agreement with him was, that all the preliminary expenses were to be defrayed by him. *Rennie v. Clarke*, 5 Exch. 292, has some bearing on this question. There, in an action by the plaintiffs for work done as engineers for a railway company of which the defendant was a member of the provisional committee, the plaintiffs gave in evidence certain resolutions of the committee made at a meeting at which the defendant was present: the defendant offered in evidence a resolution to the effect that the engineers should be employed, but that the members of the provisional committee were not to incur any personal responsibility; and it was held that this resolution was receivable in evidence, although the plaintiffs were not present at the meeting at which it was passed. Merely showing the plaintiffs the resolution of the 2d of June, was not communicating to them the whole truth. Payne's position as secretary did not warrant his showing it. And there was no evidence of any representation by the defendant to the plaintiffs.

WILLES, J.—This is an action brought to recover the value of work and labour done by the plaintiffs and alleged to have been done for the *391] defendant. There *is no doubt the work was done; and the only contention between the plaintiffs and the defendant on the matter depended on this proof,—that the work was done in procuring advertisements to be inserted in certain newspapers for a company of which the defendant was a provisional director, that his name appeared as such in the prospectus, that it was necessary to the process of forming a company that advertisements should be published, and that the defendant and others of the directors at a meeting had resolved that they should be so published, and had given directions which ordinarily would have authorized their secretary to order the work in question to be done. Up to this point the case is a clear one. In none of the numerous cases to which allusion has been made has the question ever

arisen in the present form; because nobody ever entertained a doubt, whatever the position occupied by provisional directors as to the secretary, that, upon a resolution of the provisional directors that advertisements shall be inserted, acted upon by the secretary, the person advertising may sue the persons who made the resolution and so authorized the advertisements to be inserted. The resolution of the 2d of June, therefore, was a plain direction to the secretary, on the part of the provisional directors, to cause the work to be done for them. But it is said that the case is affected by a private agreement by the directors with the secretary, that, although they appear before the public and lend their names as provisional directors, and though in the event of the company being successfully formed they were to be rewarded for the colour their names gave to the concern, yet that, in the event of the speculation turning out to be worthless, they were to be borne harmless against all claims, notwithstanding they might have expressly authorized the work to be done. I assume there was such an agreement,—that these *provisional directors were to appear to be the persons who were to determine as to what [*392 should be done, and appear to direct and govern the secretary as if they had been real directors, and not mere phantoms to induce people to invest their money in the concern; and that, notwithstanding they should enter into resolutions authorizing the incurring of expenses, they were not to be liable to persons who should be induced to act upon such resolutions, in ignorance of the secret arrangement entered into with their servant, who is in fact their master, that they shall not be personally liable. I am of opinion that such an agreement as that cannot for a moment be permitted to stand in a court of law, and for this reason, because the directors do not provide for the case of its appearing to one ignorant of their secret agreement, acting upon the resolution as being a truthful representation, and assuming that he was doing what he did for the principals, and not upon the individual credit of the person whom they represented as their servant. It is said that there was no representation with the sanction of the directors that they were the principals. That depends upon what Mr. Lush almost took for granted, and in a way in which I must confess I was unable to follow him, viz. that the directors who resolved that the advertisements should be inserted by their secretary, did not authorize him to represent that their insertion was authorized by them. It appears to me that the directors did authorize the secretary to represent, if the inquiry were made of him, what was the authority under which he acted. It was most natural that such an inquiry should be made. It is in the ordinary and necessary course of what would take place upon such a resolution being entered into. If a man is to be bound by the ordinary and necessary consequences of his acts, the defendant must be responsible for the orders given by *the [*393 secretary. It is said that this is excluded by the previous agreement that Payne alone should be liable for all the preliminary expenses, and that any authority conferred upon Payne by the resolution was limited by that bargain. But, what was the object of these persons being put forward as provisional directors? It evidently was to give an air of respectability to the concern. I presume it would not have been in accordance with that object, that the fact of their

consenting to act as directors should appear coupled with a statement that they were to be rewarded with a certain number of paid-up shares, and guaranteed by the secretary against liability for any of the preliminary expenses; that would be showing so little confidence in the concern, that the scheme would have been entirely ruined if it had been made known to the public that the persons put forward as provisional directors were not the real promoters. So far, therefore, from its being the duty of Payne to communicate to the plaintiffs the secret understanding between himself and the directors, I apprehend the whole object of the parties would have been frustrated if he had done so. I entertain a very decided opinion, that the Chief Justice was quite right in leaving the question to the jury as he did, and that the verdict was also right.

BYLES, J.—I am of the same opinion. The mere fact of the defendant's name appearing amongst the provisional directors, and of his having attended meetings of that body, would not have been enough to render him liable for work done upon the order of the secretary: and it may be that Payne had no authority to make the representation or communication which he did to the plaintiffs. There are two cases in which a principal becomes liable for the acts of his agent,—
 *394] one, where the agent acts within the limits of his authority,
 *—the other, where he transgresses the actual limits, but acts within the apparent limits of his authority, where those apparent limits have been sanctioned by the principal. When, therefore, the plaintiffs went to the offices of the projected company to inquire by whose sanction the advertisements were to be inserted, I think they had a right to assume that the agent at that place had authority from his employers or principals, the directors, to show the books and documents which referred to the matter in hand. I place my judgment on the ground that the defendant and his co-directors had given their agent an appearance of authority, and that the agent acted within the limits of that authority. If there was any fraud or excess, who should suffer?

KEATING, J., not having heard the whole of the argument, gave no opinion.

ERLE, C. J.—I think there was abundant evidence to go to the jury. The defendant and his co-directors intended that a company should be formed; and no doubt they never contemplated the possibility of failure. Allan, the proprietor of the estate, hoped to realize a large sum from the subscriptions, out of which Payne was to get 10,000*l*. Payne undertook to procure the names of persons of respectability and influence to act as provisional directors, offering them a qualification, and assuring them that they incurred no liability, as the preliminary expenses would be provided for. But such a private arrangement cannot protect the parties from liability upon contracts and dealings which they enter into with third persons. Certain persons having agreed to act as directors, a solicitor, an engineer, and a secretary are appointed. The directors meet. The secretary informs
 *395] them, that, as to all preliminary expenses, they are free from
 *responsibility; and the solicitor tells them they may safely act upon that assurance; and both he and the engineer assure them that they will not look to them for their charges. The defendant and

the other directors then settle and issue a prospectus inviting subscriptions. None come in; and the scheme collapses. In the meantime the directors pass a resolution authorizing the secretary to cause advertisements to be inserted in various newspapers, and he applies to the plaintiffs, who, upon the faith of that resolution and the names appearing in the prospectus, expend their labour and money in advertising the projected company. I am clearly of opinion that there was evidence enough to warrant the jury in coming to the conclusion that the defendant and his co-directors were the real adventurers, and that Payne, their secretary, had authority to order the advertisements to be inserted, and that consequently they had a right to look to them for payment. Rule refused.

Lush prayed leave to appeal. He stated that there were many other claims beside the present (which was for between 1400*l.* and 1500*l.*) which were depending upon the result of this action: and he submitted, that, inasmuch as the opinion just intimated presented a somewhat novel view of the cases, and as the defendant might have appealed as matter of right if the leave to move had been unconditionally reserved, it was not unreasonable to allow him to take the judgment of a court of error.

PER CURIAM.—Under the circumstances, we think the defendant may have leave to appeal. Leave to appeal granted.

*EDWARD NORRIS, Appellant; JOHN CARRINGTON, [*396
Respondent. May 9.

Prohibition will not lie to the county-court, however erroneous its decision, where there is jurisdiction.

Where cause is shown against a rule in the first instance, the costs are in all cases in the discretion of the court, but will rarely be given.

THIS was an action brought in the county-court of Montgomeryshire by Carrington, a miner, against Norris, the owner of a mine, to recover a sum of 30*l.* for work done.

The defendant pleaded,—first, his bankruptcy and certificate,—secondly, that, by a conveyance dated the 19th of January, 1863, and made between himself of the one part, and one Watts of the other part (and executed by the plaintiff as assenting thereto), all the estate and effects of the defendant were conveyed to Watts absolutely, to be applied and administered for the benefit of the creditors of the defendant in like manner as if he had been adjudged bankrupt; that, by a certificate dated the 27th of January, 1863, under the hand of R. B., Esq., registrar of the Court of Bankruptcy, it was certified that the said deed was on the 27th of January, 1863, duly filed and registered pursuant to the provisions of the Bankruptcy Act, 1861; and that such certificate was available to the said defendant for all the purposes of protection in bankruptcy.

In support of his plea the defendant produced the deed (which was in the form given in Schedule D. to the Bankruptcy Act, 1861), with the certificate of the registrar endorsed thereon, and also proved the execution of the deed by the plaintiff.

The judge ruled, "that, although the deed was admissible in evidence as being a deed executed by the plaintiff, the mere fact of the execution of such a deed or the production of such certificates and other proofs so adduced by the defendant, afforded no answer to *397] the action; and that the defendant should have adduced proof of the assent or approval of the majority in number representing three-fourths in value of the creditors of the defendant, as required by the Bankruptcy Act, 1861; and that the production of the certificate endorsed on the deed, and the certificate of the registrar, although respectively under the seal of the Court of Bankruptcy in London, was no proof that the conditions mentioned in the act had been observed:" and he thereupon directed the jury to find for the plaintiff, which they did.

The defendant appealed against this decision; but his appeal failed in consequence of his having omitted to give within the proper time the security required by the 13 & 14 Vict. c. 61: see Norris, app., Carrington, resp., ante, p. 10.

Prideaux, for the defendant, now moved for a writ of prohibition, to restrain the judge of the county-court from issuing execution upon the judgment therein. [ERLE, C. J.—The judge of the county-court thought the requirements of the statute had not been complied with. Can we prohibit the county-court from enforcing its judgment in a matter which is within its jurisdiction?] It will be manifestly contrary to the whole scope and spirit of the bankrupt laws to allow an execution to issue under circumstances like these.

Baylis showed cause in the first instance.—However the judge may have mistaken the law, if the matter was within his jurisdiction this Court has no power to issue a prohibition: *Toft v. Rayner*, 5 C. B. 162 (E. C. L. R. vol. 57). And if it is a matter of discretion, the court would not under the circumstances interfere. The plaintiff had obtained judgment and issued execution. The defendant was then let *398] in to re-try the cause on depositing a sum of 50*l.* to abide the event. On the second trial the plaintiff again obtained a verdict, and the defendant appealed. He was again unsuccessful; and, after these successive defeats, he now seeks to obtain a prohibition. There clearly is no pretence for it.

ERLE, C. J.—The question before the judge of the county-court was one over which he clearly had jurisdiction. Under these circumstances, we cannot grant a prohibition. The rule must be refused.

Baylis asked for the costs of appearing to oppose the rule.—[ERLE, C. J.—Costs are never given where cause is shown in the first instance.] That is not an inflexible rule. In *Rennie v. Berresford*, 3 D. & L. 464, 469, Sir John Bayley asked for costs of appearing to show cause in the first instance. M. Smith, contra, submitted that a party who appeared to show cause in the first instance was not entitled to costs,—citing 2 Chitty's Archbold, 7th edit., p. 1194 (11th edit. p. 1567), *Fitch v. Green*, 2 Dowl. P. C. 439, *Read v. Spear*, 5 Dowl. P. C. 330, 2 M. & W. 76, and *Begbie v. Grenville*, 3 Dowl. P. C. 502. Pollock, C. B., there says: "The general rule is certainly as stated in those cases; but there the rule nisi could not, if granted, have operated as a stay of proceedings, or have prejudiced the opposite party, if he neglected to show cause in the first instance. But this case is dis-

tinguishable; for, the rule, if obtained, would have stayed the proceedings, and have deprived the plaintiffs of the opportunity of trying the cause at the next sittings. So far it might have prejudiced them: they were therefore interested in instructing counsel to show cause in the first instance, and it is reasonable therefore that they should be allowed the costs of that step." And Alderson, B., says: "Where delay would be prejudicial to a party, he *is justified in coming [*399 to prevent that delay." So here, it is submitted, the plaintiff was justified in coming in the first instance, in order to prevent a further delay in obtaining the fruits of his verdict and judgment.

ERLE, C. J.—The costs are in the discretion of the court. And in this case I do not feel inclined to help you more than the law obliges us to do so.

The rest of the court concurring,

Rule refused, without costs.

CLEVELAND v. SPIER. *April 16.*

Where there are two modes of doing a work in a public highway from which damage may result to a passer-by, the one mode more dangerous than the other,—though both are usual modes,—it is for the jury to say whether the adoption of the former mode amounts under all the circumstances to negligence.

A passer-by who is casually appealed to by a workman for information respecting a thing which the latter is doing in a public thoroughfare, is not to be considered a "volunteer assistant," so as to exonerate the workman's master from responsibility for an injury resulting to the former from the workman's negligent mode of doing the work.

THIS was an action brought by the plaintiff, a working man, against the defendant, who was a contractor for the supply of gas to the town of Richmond, in Surrey, to recover damages for an injury to the plaintiff's eye through the alleged negligence of the defendant's workmen.

The cause was tried before Keating, J., at the sittings at Westminster after the last term. The facts were as follows:—On the occasion of a public rejoicing, the defendant had been employed to erect gas-pipes for an illumination in front of a house on the road leading up to Richmond Hill. For this purpose it was necessary to dig a trench in the roadway to get at the main. Two pipes being thus exposed, the defendant's *workmen, being doubtful which was the gas [*400 and which the water main, appealed for information to the plaintiff, who happened to be passing. The plaintiff thereupon got into the trench, and pointed out the gas-main, into which the defendant's workmen proceeded to make a hole for the insertion of the service-pipe. This was done by punching or cutting with a chisel called a "diamond-point," which was proved by the plaintiff's witnesses to be a more dangerous (though not unusual) mode of doing the work than drilling, inasmuch as it caused particles of iron to fly off; which did happen on this occasion,—a piece of the metal entering the plaintiff's eye whilst he stood by looking on, and seriously injuring him.

On the part of the plaintiff it was proved, that, when cutting was resorted to for such a purpose as this, it was usual to put up a screen in a crowded thoroughfare.

On the part of the defendant it was submitted that the plaintiff was not entitled to recover, for that, having volunteered his services to assist the defendant's workmen, he could be in no better position in this respect than if he had himself been in the defendant's employ: and *Potter v. Faulkner*, 1 Best & Smith 800 (E. C. L. R. vol. 101), was relied on. There, while the defendant's porters were lowering bales of cotton from the defendant's warehouse, and his carman was receiving them into his lorry, the plaintiff, who was waiting with another lorry to receive a load of cotton for his master, at the request of the defendant's carman, assisted him, and, in consequence of the negligence of the defendant's porters, a bale of cotton fell upon and injured the plaintiff. There was no negligence or want of reasonable care on the part either of the plaintiff or of the defendant's carman. It was held,—adopting the decision of the Court of Exchequer in *401] *Degg v. The Midland Railway Company*, 1 Hurlst. & N. 773,—that the defendant was not reponsible. Erle, C. J., in delivering the judgment of the Exchequer Chamber, says: "This is the case of one who volunteers to associate himself with the defendant's servants in the performance of his work, and that without the consent or even the knowledge of the master. *Such an one cannot stand in a better position than those with whom he associates himself, in respect of their master's liability*: he can impose no greater obligation upon the master than that to which he was subject in respect of a servant in his actual employ. And it is clear law that the master would not have been liable if the servant below had been injured by the negligence of the servants above."

It was further submitted on the part of the defendant, that, as the mode of doing the work was admitted to be a usual mode, and there was no evidence of negligence, the mere fact of there being another mode which was free from that particular danger, did not show a cause of action.

The learned judge reserved the defendant leave to move to enter a nonsuit.

The defendant and the man who did the work were then called for the defence. Both admitted that they were aware of the other mode of effecting a junction with the main; and the defendant said that he usually adopted the drilling, for the purpose of preventing the escape of gas: but he added, that, in this particular case, the road being narrow, and speed desirable, he considered the mode here adopted the preferable one.

In the course of the plaintiff's case, evidence was received of a similar accident having happened to a boy in the Mile-End Road in consequence of the same mode of perforating a pipe in the public thoroughfare having been adopted.

*402] The learned judge left it to the jury to say whether or not the defendant's workman had been guilty of negligence, and whether the plaintiff was himself contributory to the injury he had sustained.

The jury returned a verdict for the plaintiff, damages 25*l*.

Parry, Serjt., now moved to enter a verdict for the defendant, or a nonsuit, or for a new trial on the ground of misdirection and misreception of evidence.—He submitted that the evidence of what hap-

pened to the boy in the Mile-End Road was clearly irrelevant: it could only have been offered for the purpose of showing that the mode of proceeding adopted here was a negligent one, for which purpose it was plainly inadmissible. [KEATING, J.—I have no note that the evidence was objected to. And at the close of the defendant's evidence, I withdrew the leave to move.] The learned Serjeant then submitted that there was no evidence to warrant the conclusion of the jury: there must be some direct and unequivocal evidence of negligence to render a man liable for so purely accidental an injury.

ERLE, C. J.—No leave having been reserved, the question is whether there has been any misreception of evidence, or any misdirection,—or, in other words, whether there was any evidence of negligence which my Brother Keating was warranted in leaving to the jury. In deciding whether or not the defendant by his workmen was guilty of want of reasonable care, it is very material to consider that this work was being done in a public highway, and that the plaintiff was a passer-by having a right to be on the highway. The defendant was bound to take all reasonable care to prevent injury to persons thus lawfully exercising their *rights. I think the [*403 jury were justified in taking into their consideration the fact that there was another mode of doing the work, viz. by drilling, which would have made such an accident as this impossible, and also, that it was usual (in a crowded neighbourhood), when cutting was resorted to, to use a screen. The evidence certainly was weak; but still there was evidence for a jury. As to the reception of evidence of what happened in the Mile-End Road,—it does not appear that its reception was opposed. But I think, if I had been the judge, I should have overruled the objection, if it had been taken.

The rest of the court concurring,

Rule refused.

In the Matter of an Arbitration between THOMAS WILLIAM BROOK, F. & A. DELCOMYN, and F. & J. BADART, Frères.
April 30.

1. Although mercantile arbitrators are not bound by the strict rules of evidence, yet they cannot be permitted to transgress that fundamental principle of justice which declares that no man shall be condemned, either civilly or criminally, (a) without being afforded an opportunity of hearing the evidence adduced against him, and offering his defence.

2. A contract was entered into for the sale of a cargo of rape-seed to be shipped at a Danish port for Rochester, "warranted to be at the time of shipment in sound, dry, and merchantable condition," and with a stipulation that "any dispute arising out of the contract should be settled by arbitration in the usual way."

On arrival of the rape-seed at Rochester, it was found in such bad condition that the buyer refused to receive it. Ultimately the matter was referred to two arbitrators,—A. named on the part of the seller, and B. on the part of the buyer,—with recourse to an umpire, to be chosen by them in case of disagreement. The arbitrators not agreeing, the matter was left to the umpirage of C., to whom A. and B. each sent a written statement containing their respective views, and also certain documents which had been before them.

The umpire, without calling any of the parties before him, but professing to proceed upon

(a) Except before a coroner's jury,—a barbarism which the enlightenment of the nineteenth century has hitherto failed to put to shame.

the statements and documents so submitted to him, made an award directing that the seller should take back the cargo, and repay the buyer the amount of the invoice-price, which he had paid.

The seller having afterwards discovered that the umpire had, without any notice to him or to A., his arbitrator, inspected samples of the seed at the counting-house of B., the other arbitrator, and also had communications with the persons by whom the cargo had been inspected and the samples taken,—moved to set aside the award.

The Court made the rule absolute, on the ground that the conduct of the umpire (though sworn by several competent persons to be sanctioned by mercantile usage) was a violation of the universal principles of justice.

ON the 26th of July, 1863, Mr. Brook, an oil-seed crusher near Maidstone, in Kent, through his brokers, Soanes, Son & Page, of London, made a contract with *Messrs. Badart, of London, for the *404] purchase from them of a quantity of Danish rape-seed. The contract was contained in corresponding bought and sold-notes. The bought-note delivered to Brooke by Soanes, Son, & Page, who acted also as brokers for the sellers, was as follows:—

“London, 24th July, 1863.

“Bought for account of Mr. T. W. Brook, of Messrs. Badart, Brothers, 600 to 700 qrs. (little more or less) Danish rape-seed, to be shipped at one or more Danish ports during August or September next (sellers' option), and warranted to be at time of shipment equal to the fair average quality of this season's shipments of Danish rape-seed, and in sound, dry, and merchantable condition, at 65s. per quarter, cost, freight, and insurance to London or any safe port on the east coast included. Invoice quantity guaranteed. Payment to be made in London in exchange for shipping documents, less 1½ per cent. discount. Any dispute arising out of this contract to be settled by arbitration in London in the usual way. Particulars of shipment to be duly declared.

SOANES, SON, & PAGE.”

Brook having received notice through his brokers that the sellers had shipped 609 qrs. of rape-seed per the Iris at the port of Randers, in Denmark, on the 7th of September, 1863, paid through them the contract-price (1896l. 17s. 1d.) less the freight, &c., and named Rochester as the port for delivery. The Iris arrived at Rochester on *405] the 6th of October, when Brook, finding *on inspection, that the seed was in bad condition, and judging from its appearance that it had not been shipped in “dry, sound, and merchantable condition,” according to contract, declined to accept it, and demanded an arbitration. Brook then for the first time discovered that Messrs. Badart were not the shippers of the seed, but had purchased it from Messrs. Delcomyn. It being necessary to land and warehouse the rape-seed, this was done by Brook, with the consent of all parties, at Stroud, between the 10th and 14th of October.

After some controversy between the parties, it was ultimately agreed that the matter should be referred, and the following memorandum was drawn up and signed by them respectively:—

“We, the undersigned, having a dispute about the cargo of rape-seed per Iris, arrived at Rochester, hereby agree, in accordance with our respective contracts, to have the dispute settled by arbitration, and to abide by the decision of the arbitrators (Mr. Cramer on behalf of Messrs. Delcomyn, and Mr. Bevan on behalf of Mr. T. W. Brook);

but, in case they do not agree, we undertake to abide by the final decision of the umpire mutually chosen by the two arbitrators.

"THOMAS W. BROOK,

"F. & A. DELCOMYN,

"F. & J. BADART, Frères."

"London, Oct. 30, 1863."

The arbitrators, before proceeding far with the reference, finding that they were not likely to agree, appointed one Whealler as umpire, by a memorandum of which the following is a copy:—

"The undersigned referees appointed to decide a dispute arising out of a sale of Danish rape-seed per Iris, à Randers, not being able to arrange the same, *hereby appoint Mr. John A. Whealler, [*406 of, &c., to be their umpire, and agree to abide by his decision.

"JOHN C. D. BEVAN,

"F. A. CRAMER."

"London, Dec. 4, 1863."

Having heard the parties and considered the surveys and other documents produced before them, the arbitrators agreed that each should send a statement of his opinion for the umpire's consideration. The statement of Mr. Bevan, the arbitrator appointed by Mr. Brook, was as follows:—

"Mr. F. A. Cramer and myself, as referees in an arbitration upon a cargo of damaged rape-seed ex Iris à Randers, and now lying in granary at Stroud (Kent), being of different opinions as to whether the conditions of contract have been fulfilled or not, we have agreed to submit our separate statements for your decision.

"By the evidence before me, I find that a contract was entered into by Messrs. Badart, through Messrs. Soanes, Sons & Page, under date the 24th of July, 1863, to ship 600 to 700 qrs. of Danish rape-seed during August or September following, at 65s. per quarter, C. F. and I. to London or any safe port on the east coast; and amongst other conditions were the following,—'Warranted to be at time of shipment equal to the fair average quality of this season's shipments of Danish rape-seed, and in sound, dry, and merchantable condition.' The vessel sailed on the 2d of September, and reached Rochester (her port of discharge) on the 6th of October, making a voyage of thirty-four days.

"On reaching Rochester, the state of the cargo was so bad, especially in the centre of the vessel, that the authorities hesitated whether to permit her remaining in the harbour, but afterwards allowed the seed to be *landed where it now lies. The weight at time of discharge, I understand was 43 lbs. per bushel. The weight when [*407 last tried, November 7th, was 34 lbs. to 35 lbs. (the excess of measure was 68 qrs., or about 10 per cent.); the loss of weight about 20 per cent. A dozen samples taken by Messrs. Barry are at my office for your inspection. Although the captain of the Iris states that he had a bad voyage, I cannot have any proof that the horrible condition the cargo arrived in was owing to any accident on the voyage, as not the slightest appearance of sea-damage could be discovered in any part of the ship, when carefully surveyed at Rochester for that purpose. The conclusion, therefore, I have arrived at, is, that rape-seed which after thirty-four days' passage in a vessel entirely free from all trace

of leakage or sea-damage arrives half destroyed, cannot in fact have been shipped as contracted for, viz. in sound, dry, and merchantable condition.

"I therefore take my ground on the facts of the case, which no certificates can alter (for, I believe it can be proved by chemical analysis that the injury complained of does not arise from sea-water), and consider sellers should take back their cargo (having broken their contract in so vital a point), and repay to buyers the amount of invoice. I enclose contract and documents relating to this affair."

The statement furnished by Mr. Cramer, the arbitrator appointed by Messrs. Delcomyn, was as follows:—

"I herewith enclose to you as umpire mutually chosen by Mr. Bevan and myself in the arbitration on a cargo of rape-seed per Iris, from Randers to Rochester,—1. the contract,—2. the certificate (and translation) proving that the cargo was cool and in good order thirteen *408] days after sailing,—3. declaration (and *translation) certifying that the seed was at the time of shipment dry, sound, and fit to be shipped,—4. extract of ship's log-book, certified by the Danish consul here,—5. a résumé of the matter in question.

"The question turning on the proper fulfilment of the contract, I find that the same has been duly carried out. The shipper proves, so far as lies in his power, that the seed was dry, sound, and fit for shipment. This appears further confirmed by the examination instituted by the captain in Norway thirteen days after leaving the port of shipment. He subsequently again encountered dreadful weather, and made the port of Rochester on the 6th of October, being three weeks after the seed had been seen in good condition in Norway, and five weeks since sailing from Randers.

"You will observe in the extract from the log-book, that seed was constantly pumped up, which could not have been the case if the ship had not made water; and, taking into consideration the length of the voyage, and opening of the hatches in Norway, the heating of the cargo is but a natural consequence. It is not reasonable to suppose that no water whatever found its way into the seed; and the pumping it up proves the fact: and, under the circumstances, but a very small quantity of water would suffice, in my belief, to heat the cargo during the protracted voyage.

"It appears that, on landing, the damaged seed was indiscriminately mixed up with the sounder portion, and the lumps caused by the contact of the sea-water with the seed, more or less broken. Sufficient remains, however, to show that sea-damage existed, especially near the pump-well and mast.

"It was suggested to me by Mr. Bevan that we should send down persons of experience to report on the seed: and you will herewith *409] receive Mr. T. R. *Keen's statement, who, you will be aware, has had considerable experience, extending over many years.

"From what I have seen of Danish rape-seed, I believe no cargo could under the circumstances have possibly arrived cool and in good order: and, as the shipper did not guarantee the condition at the port of discharge, but merely undertook to ship 'fair average quality of this season's shipments, in sound, dry, merchantable condi-

tion,' I hold that he has carried out the contract, and that the buyer, who has to bear the risk of the voyage, has no claim whatever.

"I shall be happy to answer any questions you may think proper to put: and, should you desire any further information of Mr. Keen, he will be ready to give it to you."

The umpire, without giving any notice to the parties, or giving them any opportunity of being heard before him, on the 11th of December made his award or certificate, in the form of a letter addressed and sent to the arbitrators, as follows:—

"Dear Sirs,—Having been appointed by you as umpire in an arbitration upon a cargo of rape-seed shipped at Randers, per Iris, to Rochester, and now lying in granary at Stroud in a very damaged state from heating on the voyage; and having carefully considered the statements and certificates made on behalf of both the buyer and seller; I have no hesitation in deciding that the said cargo was not in sound, dry, and merchantable condition when shipped, as warranted by the contract, and that the damage does not arise from sea-water; that the said contract is consequently broken; and that the seller must take back the cargo, and repay the purchaser the amount of invoice and charges.

"JOHN A. WHEALLER."

Lush, Q. C., in Hilary Term last, on behalf of Messrs. *Delcomyn, obtained a rule calling upon Brook and Messrs. Badart [*410 to show cause why the above award should not be set aside, on the grounds,—first, that the umpire exceeded his authority by awarding that the seller should take back the cargo and repay the purchaser,—secondly, that the umpire did not give Messrs. Delcomyn any opportunity of being heard, and received samples from the other side without any communication with Messrs. Delcomyn. The rule was moved upon the affidavits of Messrs. Delcomyn and of Cramer, their arbitrator, which, in addition to the facts above detailed, stated that, "the usage in the corn and seed-trade is, that, when an umpire has been appointed, he, after perusal of any documents which may have been handed to him, appoints a meeting, at which the parties in difference attend before him and explain their respective views, and give such evidence as they may deem expedient;" that "although the umpire did not communicate with Messrs. Delcomyn or their arbitrator, they were informed and believed that he did between the 4th and 11th of December communicate with Brook, through Bevan, and received from him samples or alleged samples of the cargo, which samples Messrs. Delcomyn had no opportunity of inspecting, and, had they had such opportunity, they verily believed they would have been in a position to prove that the same were not accurately or fairly taken from the cargo;" and that, "until after the making of the award, neither Messrs. Delcomyn nor their arbitrator ever heard that Brook or Messrs. Badart claimed the right to reject the cargo per Iris, but they believed that the only dispute between the parties to the reference was as to whether or not an allowance, or payment in the nature of an allowance, and, if so, of what amount, should be made by Messrs. Delcomyn in respect of the alleged inferiority of the cargo."

**Bovill*, Q. C., and *Cohen*, on behalf of Brook, now showed [*411 cause, upon, amongst others, affidavits of Mr. Brook and of Mr. Bevan, which, after denying generally that there had been any

unfair dealing or that the reference was of the limited nature suggested on the other side, stated that, "there is not any usage in the oil-seed trade, that, when an umpire has been appointed, he, after perusal of any documents which may have been handed to him, appoints a meeting, at which the parties in difference or their representatives attend before him and explain their respective views, and give such evidence as they may deem expedient;" that it is the usual and ordinary practice in the oil-seed trade (and likewise, so far as the deponents' knowledge and experience extended, in mercantile arbitrations generally) for an umpire, in case he sees fit so to do, without any communication with the other side or their arbitrator, to inspect samples produced on behalf of one of the parties and referred to in his arbitrator's statement furnished to the umpire, and also for the umpire, in case he sees fit to do so, without notice to any of the parties, and in their absence, to put himself into direct communication with any one or more of the witnesses who have surveyed the cargo, and whose reports or certificates may be before him, and also for an umpire to receive from each arbitrator a written statement regarding the dispute, and certificates and other documentary evidence in support of such statement, and also for the umpire, in case he sees fit to do so, to make his award without giving the parties or arbitrators any opportunity of being heard;" and that, "in carrying out an arbitration and umpirage in the oil-seed trade (and also, so far as the deponents' knowledge and experience extended, in mercantile arbitrations generally), where mercantile arbitrators and mercantile umpires are appointed, it is not *customary to follow the rules or regulations *412] followed by lawyers in such matters; and it is customary for such arbitrators or umpires to award whatever they as mercantile men may consider just and fair in a mercantile point of view as between the parties, and without regarding strict law or legal technicalities; and it is understood that such award has to be fulfilled, though not made out in a legal form or in accordance with legal rules and technicalities."

This statement of the practice was corroborated by the affidavits of several oil and seed-brokers of extensive experience; and Whealler, the umpire, also made an affidavit, in which he deposed as follows:—"In my looking at samples at Mr. Bevan's counting-house, without any communication with Messrs. Delcomyn, and in my communicating direct with Mr. Barry and with Mr. Keen, who had surveyed the rape-seed, and in my making my award without giving Messrs. Delcomyn or Messrs. Badart any opportunity of being heard, and in all that I did in the matter of the reference, I followed the usual and ordinary practice in such cases; and, so far as my knowledge and experience extends, the course which I pursued in this matter is similar to what is usually adopted by mercantile umpires in such cases."

The complaint on the part of Mr. Brook, at the utmost, is, that the umpire has received improper evidence. [BYLES, J.—In the absence of the other side.] A consent or a waiver will justify anything. [WILLES, J.—You may waive your right to be heard: but, to import a usage that the party shall not be heard, is quite another thing.] In *Hall v. Lawrence*, 4 T. R. 589, it was held to be no ground for setting aside an award of an umpire, that he received evidence from the arbi-

trators, without examining the witnesses, unless he were required to re-examine them before the *making of his award. So, in *Re Turner and Bird*, 5 B. & Ad. 488 (E. C. L. R. vol. 27), an [*413 umpire being furnished by the arbitrators with the evidence taken before them, and having himself viewed the premises, the condition of which was the question, made his award without calling for further evidence, or giving any notice on that subject to the parties: and it was held that the award could not be objected to on that ground by a party who knew that the case had gone before the umpire, and made no application to him to hear further evidence. If the party knows that an umpire is appointed and does not apply for a meeting, he cannot afterwards be allowed to say that he has not had an opportunity of being heard before him. *Mills v. The Master, &c., of the Bowyer's Company*, 3 Kay & J. 66, is an authority to show that a mere communication held by the umpire with the agent of one of the parties is no ground for impeaching the award, in the absence of some evidence that he was thereby unduly influenced.(a) *Hale v. Rawson*, 4 C. B. N. S. 85 (E. C. L. R. vol. 93), and the case of *The Peerless*, 1 Lushington's Adm. R. 30, were also referred to.

Potter, for Messrs. Badart, professing to be in a state of strict neutrality, was not heard.(b)

**Lush*, Q. C., and *Sir George Honyman*, in support of the [*414 rule.—It is contrary to the first principles of justice to decide against a party without giving him an opportunity of being heard. It is a fundamental principle the violation of which no custom, however ancient or universal, will sanction or uphold. [ERLE, C. J.—Were the samples taken by Mr. Barry shown to Cramer?] No.

ERLE, C. J. (stopping them).—I am of opinion that this rule for setting aside the award must be made absolute. The award was made by an umpire appointed on the failure of the two arbitrators to agree. The reference arose out of a contract for the sale of a quantity of Danish rape-seed, which contained the following clause,—“Any dispute arising out of this contract to be settled by arbitration in London in the usual way.” I have always a great desire to give effect to mercantile customs, and to the awards of mercantile arbitrators, unless they infringe upon principles of wider importance. It is clear that parties may agree to refer their differences subject to any special terms and conditions they please as to the mode of conducting the reference. But this is not a reference with that wide discretion. The dispute is to be referred in the usual way. The usage of merchants

(a) Vice-Chancellor Page Wood in that case says: “I accede to the view that it would be a great deal too dangerous to allow any arbitrator, or any umpire, to have communications with some of the parties without the knowledge of the other parties to the reference, and then to say that he was not influenced by anything which took place. But, in this case, it appears that the only thing that took place was one which every person knew of at the time, and they allowed the reference to proceed without making any objection.”

(b) Upon an application in Hilary Term to enlarge this rule, it was, by consent, ordered that the cargo should be sold by Messrs. Soanes, Son & Page, for the benefit of whom it might concern, and that the proceeds thereof should be paid by Messrs. Soanes, Son & Page to Brook,—such sale, payment, and receipt respectively to be without prejudice to the right of either of the parties, and the proceeds to be considered as representing the rape-seed: and it was further ordered that an action which had been brought in this court by Brook against Badart, Brères, should be stayed until after this rule should have been disposed of.

is imported into the contract, and, if a lawful usage, will bind the parties. Two arbitrators having been *appointed,—Mr. Bevan
*415] on the part of Brook, and Mr. Cramer on the part of Messrs. Delcomyn,—they proceeded to take evidence but failed to agree. It was clearly the duty of each to lay before the other all the information which he possessed touching the matter in hand; and, in case of difference, to appoint an umpire. The umpire, according to all usage, ought to be informed of everything which has come to the knowledge of the arbitrators. They are not bound by any technical rules: and I am of opinion, that, however erroneous in point of law the decision of the arbitrators or of the umpire might be, neither party would have any legitimate ground of complaint. But the ground upon which I come to the conclusion that the law has been violated in this case, and that the usage relied on is contrary to the acknowledged principles of justice, is, that Bevan, one of the arbitrators, brought before the umpire evidence which never had been communicated to Cramer, the other arbitrator, and which Messrs. Delcomyn, consequently, never had an opportunity of meeting by contradictory evidence. It is quite obvious that samples taken from the cargo on the arrival of the vessel at Rochester would decide the question between the parties in the mind of any experienced person conversant with the seed-trade. It appears that Bevan, the arbitrator named by Brook, laid before the umpire samples which he had caused to be taken by Messrs. Barry, and which samples had never been seen by Cramer, the arbitrator named by Messrs. Delcomyn. This circumstance, unknown to Messrs. Delcomyn and their arbitrator at the time when the umpire was called upon to decide between the parties, might well have disposed of the case. That of itself is quite sufficient to found our judgment. I take it each arbitrator had a right to make a statement to the umpire of facts which were known to both of them.
*416] But *I doubt much whether any usage can sanction the communication to him of facts which have come to the knowledge of one of them only. Several gentlemen of undoubted respectability and large experience have sworn that what was done here was done in accordance with the usage of mercantile references: and I am convinced that none of the parties here concerned would intentionally do what is wrong. But, if such a course were to be sustained, it would open a door to the possible perpetration of much fraud. This is not a technical objection. It is one of the first principles in the administration of justice, that the tribunal which is to decide must hear both sides and give both an opportunity of hearing the evidence upon which the decision is to turn. I am not by any means deciding this case on a point of form, but upon a matter of substance, and one of the last and deepest importance. It may be said that in doing this I am setting up my own individual and imperfect sense of right against the opinions and the usages of mercantile men on a purely mercantile question. But I find the master minds of every century are consensaneous in holding it to be an indispensable requirement of justice that the party which has to decide shall hear both sides, giving each an opportunity of hearing what is urged against him. Much learning is to be found in the books upon this subject from the time of

Lord Coke (a) downwards, which it would be waste of time to cite. *I will only refer to one case which occurred whilst I was a member of the Court of Queen's Bench,—The Queen v. The Archbishop of Canterbury, 1 Ellis & Ellis 545 (E. C. L. R. vol. 102). There, the archbishop, on an appeal against the revocation of a curate's license, under the 1 & 2 Vict. c. 106, s. 98, had confirmed the revocation without a hearing; but merely upon the statements made by the curate in his petition of appeal, and the written documents referred to in such petition: and the court issued a mandamus commanding him "to hear the said appeal and decide the merits thereof." Lord Campbell said: "It is one of the first principles of justice, that no man should be condemned without being heard. We do not say whether the archbishop's decision was right or wrong. We only say that he has not heard the petition. 'Qui statuit aliquid, parte inauditâ alterâ, æquum licet statuerit, æquus haud fuit.' The legislature here gives an appeal from the bishop to the archbishop: that implies that the appellant is entitled to an opportunity of being heard." I feel, therefore, bound to hold that any mercantile usage, however long established, that an umpire may decide the question submitted to him upon the representations of one arbitrator, without hearing the other party or giving him an opportunity of knowing what has passed, cannot for a moment be sustained. Parties may, undoubtedly, by agreement, warrant any course of proceeding they think fit: but here the agreement is that any dispute shall be settled by arbitration "in the usual way." That cannot mean to sanction a usage which is contrary to law. The award must therefore be set aside.

WILLES, J.—I am entirely of the same opinion. If it would be objectionable in a single arbitrator to act upon evidence given on one side, without hearing the *other, it is still more objectionable for an umpire to do so. The umpire is to be called in to decide in the event of the arbitrators chosen by the respective parties failing to agree. This assumes, that, except where new matter is brought before him, he is to decide upon the materials which were before them. The result here is, that Whealler, the umpire, decided against Messrs. Delcomyn upon evidence which was not before the arbitrators, but which was brought to his notice by the arbitrator named by Brook, without giving the other arbitrator or the parties naming him an opportunity of being heard upon it. The award is equally contrary to principle, and void, whether as being contrary to the agreement of the parties, or as a decision against one who has had no opportunity of being heard.

BYLES, J.—I am of the same opinion. I should be sorry that anything decided here should give any countenance to the notion that mercantile arbitrators are bound by the strict rules of evidence, or that a non-observance of them will afford ground for setting aside an

(a) 3 Inst. 35. "And the poet (Virgil: *Æneid*, vi. 566), in describing the iniquity of Radamanthus, that cruel judge of Hell, saith,

'Castigatque, auditque dolos, subigitque fateri.'

First, he punished before he heard; and, when he had heard his denial, he compelled the party accused by torture to confess it. But far otherwise doth Almighty God proceed, postquam reus diffamatus est,—1. vocat, 2. interrogat, 3. judicat."

award. It is not so even in the case of a legal arbitrator. One great advantage of references of this sort, as daily experience teaches us, is, that questions of mercantile usage and difficulties as to the meaning of mercantile contracts are promptly and satisfactorily settled by persons most conversant with them. But that which is complained of here is by no means a mere infringement of a technical rule of law: it is a violation of that universal principle of justice which prohibits any tribunal from deciding against a party without giving him an opportunity of hearing what is alleged against him. One observation of Mr. Lush in this case is to my mind conclusive. Samples were taken by one of the arbitrators,—and perhaps these *419] *constituted the most material evidence of all,—which were not shown to the other arbitrator. The judgment, therefore, of the latter was not exercised upon them. And afterwards, when the matter came before the umpire, the opposite party and his arbitrator had no notice that they had been brought to his attention. The judgment of the umpire, therefore, proceeded upon evidence which the party against whom that judgment passed had no opportunity of seeing or observing upon. This was manifestly deciding against the plainest principles of justice and equity. If it be said that the usage of the mercantile world justifies what was done, I have no hesitation in saying that it is *malus usus*, and cannot stand. But I think this cannot fairly be said to be within the alleged usage. As to the rule that a party must be heard before he is condemned, we had lately in this court a very remarkable case. I refer to *Cooper v. The Wandsworth Board of Works*, 14 C. B. N. S. 180 (E. C. L. R. vol. 108), where the court held, that, though the 76th section of the Metropolis Local Management Act, 18 & 19 Vict. c. 120, which empowers the district board to alter or demolish a house where the builder has neglected to give notice of his intention to build seven days before proceeding to lay or dig the foundations, makes no provision for a hearing, yet, upon principles of natural justice, the board had no power to demolish the building without first giving the party guilty of the omission an opportunity of being heard. Reference is there made to the judgment of Fortescue, J., in *Dr. Bentley's Case*, *The King v. The Chancellor, &c., of Cambridge*, 1 Stra. 557, 2 Ld. Raym. 1334, 8 Mod. 148, Fortescue 202. I may also refer to a case of *Harvey v. Shelton*, 7 Beavan 455, where an award was set aside by the Master of the Rolls on the ground of interviews having taken *420] place between the arbitrator and one of the parties, in *the absence of the other: Lord Langdale there says: "It is so ordinary a principle in the administration of justice, that no party to a cause can be allowed to use any means whatsoever to influence the mind of the judge, which means are not known to and capable of being met and resisted by the other party, that it is impossible for a moment not to see that this was an extremely indiscreet mode of proceeding, to say the very least of it. It is contrary to every principle to allow such a thing; and *I wholly deny the difference which is alleged to exist between mercantile arbitrations and legal arbitrations. The first principles of justice must be equally applied in every case.* Except in the few cases where exceptions are unavoidable, both sides must be heard, and each in the presence of the other. In every case in which

matters are litigated, you must attend to the representations made on both sides, and you must not, in the administration of justice, in whatever form, whether in the regularly constituted courts or in arbitrations, whether before lawyers or merchants, permit one side to use means of influencing the conduct and the decision of the judge, which means are not known to the other side." Every word of that is applicable to the present case.

KEATING, J., was at the Court of Criminal Appeal.

Rule absolute.

***HAYNE v. CUMMINGS and Others. April 23. [*421**

1. The words "covenant" and "condition" when used in an *agreement*, do not necessarily mean a covenant under seal or a condition in the strict legal sense of the word, but may, in order to effectuate the intention of the parties, be construed to mean "contract" or "stipulation."

2. In an agreement between A. and B., not under seal, expressed to be made "in consideration of the rents and covenants to be reserved and contained in the lease agreed to be granted," it was provided that, as soon as B. should have executed certain specified repairs, &c., A. would lease certain premises to him, his executors, &c., for thirty-five years from a day past, at the yearly rent of 15*l.*; such lease to contain certain specified covenants on the part of B. as to rent and other matters, and also all other usual and proper covenants, and especially a proviso for re-entry for non-payment of rent or non-performance of covenants: and it was further agreed, that, until the lease should be granted, the plaintiff, his executors, &c., should have the same powers and remedies for recovering and enforcing payment of the rent and performance of the covenants as fully as if the lease had been actually granted: the repairs to be completed by a given day." Then followed this proviso,—“Provided always, that, if the rent should be in arrear, &c., or if B., his executors, &c., should make default in the observance and performance of the covenants and conditions on his or their part *herein* contained, then and in either of the said cases it shall be lawful for the said B., his executors, &c., to enter the said premises, &c., and the same to have again and enjoy as in his or their former estate, and the said B. and all other occupiers thereof thereout to remove, and thenceforth these presents and everything herein contained shall cease and be void.”

B. was let into the premises, and paid rent. The repairs not having been done by the time agreed on:—Held, that A. was entitled to re-enter.

3. An agreement creating a present demise, void as a lease by the 8 & 9 Vict. c. 106, s. 3, may still enure as an *agreement*.

THIS was an action of ejectment upon a proviso for re-entry contained in an agreement not under seal.

The agreement, which was dated the 21st of January, 1863, was made between the plaintiff and one Thomas Green: and it was expressed to be made in consideration of the rents and covenants to be reserved and contained in the lease agreed to be granted, and provided that, as soon as the said Thomas Green, his executors, administrators, or assigns, should have executed certain specified repairs, and built certain rooms, the plaintiff would demise and lease the premises in question to him, his executors, administrators, and assigns, from the 25th of December, 1862, for the term of thirty-five years, at the yearly rent of 15*l.*: such lease to contain certain specified covenants on the part of the lessee respecting payment of rent and other matters, and all other covenants, provisoes, and agreements usual and proper to be inserted in leases of a like nature, and especially a proviso for re-entry on non-payment of rent or non-performance of any of the covenants to be contained in the lease. And it was further agreed that Green, his executors, administrators, or assigns, [*422

should do certain repairs and build certain rooms on the premises before certain specified days,—the repairs by Michaelmas, 1863, and the additional buildings by Michaelmas, 1864. The proviso for re-entry was as follows:—

“ Provided always, that, if the first payment of the said rent be not made within one month from the date of this agreement as aforesaid, or if any subsequent payment of the said yearly rent hereby reserved, or any part thereof, shall be unpaid for twenty-eight days after the same shall respectively become due, or if the said Thomas Green, his executors, administrators, or assigns, shall make default in the observance and performance of the covenants and conditions on his or their part herein contained, then and in either of the said cases it shall be lawful for the said Henry Hayne, his executors, administrators, or assigns, to enter the said premises, or any part thereof in the name of the whole, and the same to have again and enjoy as in his or their former estate, and the said Thomas Green and all other occupiers thereof thereout to remove, and thenceforth these presents and everything herein contained shall cease and be void.”

Annexed to the agreement was a schedule of the alterations and repairs to be done by Green.

Green was let in to defend.

At the trial before Erle, C. J., at the sittings in Middlesex after last Michaelmas Term, it was proved that the defendant had failed to perform the stipulated repairs by Michaelmas, 1863; after which day this action was commenced. The defendant had been let into possession and had paid rent.

On the part of the defendant it was submitted that there was no breach which entitled the plaintiff to *re-enter, inasmuch as, *423] the agreement not being under seal, the terms “covenant” and “condition” were inapplicable to the stipulations contained therein, but only to the covenants to be contained in the future lease.

A verdict having been taken for the plaintiff, subject to leave reserved to the defendant to move to enter a nonsuit,

O'Malley, Q. C., in Hilary Term last, obtained a rule nisi accordingly.—He submitted that the clause of re-entry applied only to a breach of any of the covenants to be contained in the contemplated lease, and that the tenant having entered and paid rent, he became tenant from year to year upon the terms of the agreement so far as they were applicable to that description of tenancy, and consequently was entitled to a six months' notice to quit.

W. G. Harrison now showed cause.—The plaintiff clearly had a right of re-entry under the agreement, though no lease was ever granted. A condition may be created without deed. [WILLES, J.—What part of the agreement do you rely on as giving you a right of re-entry?] The stipulation that, until the lease should be granted, the plaintiff, his executors, &c., should have the same powers and remedies for enforcing the performance of the covenants as fully as if the lease had been actually granted. [WILLES, J.—The lease would say nothing about the preliminaries.] Then there is the proviso, that, if Green, his executors, &c., shall make default in the observance and performance of the covenants and conditions on his or their part *herein* contained, it should be lawful for the landlord, his

executors, &c., to re-enter, &c. [WILLES, J.—That is such a proviso as is usually inserted in building *agreements: see *The Marquis of Camden v. Batterbury*, 5 C. B. N. S. 808 (E. C. L. R. [*424 vol. 94).] The words “covenants” and “conditions” do not mean covenants under seal, or conditions in the strict legal sense of the term, but merely the stipulations which the party has bound himself by. Suppose it means condition in the strict sense: no particular form of words is necessary to make a covenant or a condition.

O'Malley, Q. C., and *H. J. Hodgson*, in support of the rule.—A condition creating a forfeiture is to be construed with the greatest possible strictness. This instrument was void as a lease, by the 8 & 9 Vict. c. 106, s. 3, not being under seal. The formal lease was not to be granted until the repairs were done: and, the party having been let in, and having paid rent, he became tenant from year to year, subject to the terms so far as they are applicable to such a tenancy. The proviso for re-entry was only intended to apply in the event of a breach of any of the covenants which were to be contained in the lease. But the failure to complete the repairs by the stipulated time was not one of those covenants. The engagement to do the repairs is not a covenant, properly so called: it was something preliminary. In *Shepherd's Touchstone*, p. 160, it is said: “A covenant is the agreement or consent of two or more *by deed in writing sealed and delivered*, whereby either or one of the parties doth promise to the other that something is done already or shall be done afterwards: and he that makes the covenant is called the covenantor, and he to whom it is made the covenantee.” Nor is the stipulation to do the repairs in the nature of a “condition.” [BYLES, J.—Why may not “condition” mean “stipulation?”] (a) The **Marquis of Camden v. Batterbury* was a very peculiar case. There, great [*425 pains were taken by the parties to exclude the creation of a tenancy in the meantime. Here, a tenancy to commence immediately is expressly stipulated for. The plaintiff's proper remedy for the breach of Green's engagement was by an action, or possibly by putting an end to the tenancy by a six months' notice to quit.

WILLES, J.(b)—I am of opinion that this rule should be discharged. This is an action of ejectment brought for the purpose of recovering possession of land which it was proposed should be let by the plaintiff to Green. There was a building upon the land. It should seem, that, at the time the agreement was made, this building needed repairs; and these were to be done by Green as part of the conditions upon which the lease was to be granted. So, of the enlarging of the house. The agreement was dated in January, 1863. The lease was to date from Michaelmas, 1862, from which day rent was to be payable. It was further stipulated that the repairs were to be done by Michaelmas, 1863, and that, if they were not done by that time, Green was not to have a lease. It was further stipulated that the additions to the premises were to be made by Michaelmas, 1864, and that, if they were not so done, no lease was to be granted. Now, one of the conditions upon which Green was to have a lease of the premises, was, that the repairs should be done by Michaelmas, 1863. The repairs were

(a) See *Shaw v. Coffin*, 14 C. B. N. S. 372 (E. C. L. R. vol. 108).

(b) *Erie*, C. J., was at the Court of Criminal Appeal.

not done; and Michaelmas, 1863, went by before this action was brought. Some stress has been laid upon that part of the agreement which stipulates for a lease to be granted on the repairs being done: but it is unnecessary to say what construction the court would put *426] upon that part of the agreement if the question were before us, because the repairs were not done. Unquestionably, the event on which the lease was to be granted did not happen. If we look at the case apart from the agreement, the proper conclusion is, that the landlord is to have his land again. But we must look at the terms of the agreement. Now, the agreement provides for the event which has happened, in these terms:—Provided always, that, if the rent shall be unpaid, &c., “or if the said Thomas Green, his executors, &c., shall make default in the observance and performance of the covenants and conditions on his or their part herein contained, then and in either of the said cases it shall be lawful for the said Henry Hayne, his executors, &c., to enter the said premises, &c., and the same to have again and enjoy as in his or their former estate, and the said Thomas Green and all other occupiers thereof thereout to remove, and thenceforth these presents and everything herein contained shall cease and be void.” I apprehend that merely provides for a re-entry by the landlord in case the agreement to do the repairs by Michaelmas, 1863, should be broken, as it has been. It is urged that the word “covenant” is inapplicable to anything but an instrument under seal. It is true that the word in strictness does not apply otherwise than to such agreements as are executed under the solemnity of a seal. But in common parlance, it is applied to any agreement whether under seal or not: see the several Dictionaries.(a) There is no cove- *427] nant, properly so called, in this agreement. The covenants to be contained in the proposed lease had been previously provided for. Therefore, to say that the word “covenants” here cannot apply to the stipulations contained in this agreement, is to say that the word cannot have any sense at all. But we are bound so to construe the instrument as to give if possible effect to every word contained in it. Neither does the word “condition” necessarily apply to a condition under seal. In Comyn’s Digest, *Condition*, where the subject of conditions properly so called is discussed, a case is put in which no condition under seal exists. It is unnecessary, however, to discuss that, because any event on the happening of which another event is to take place is a condition. “I sell you my horse for 10*l*.” makes the payment of the 10*l*. as much a condition as if it were contained in an instrument under seal. Here, the doing the repairs by the day stipulated was clearly a condition; and the not doing them was a breach of that condition and a forfeiture of the party’s right to hold under the agreement. To hold that the landlord was bound to give a six months’ notice, would be most unjust. The tenant has not complied with the terms upon which alone the landlord consented to

(a) In Richardson, “to covenant” is thus defined,—“To agree, to contract, to enter into an agreement, compact, or contract.” In Johnson, a “covenant” is explained to mean “a contract or stipulation.” But the better definition is given in Webster,—“A mutual consent or agreement of two or more persons to do or to forbear some act or thing; a contract; stipulation. A covenant is created by deed in writing, sealed and executed; or it may be implied in the contract.”

let him hold the premises; and the latter was justified in taking advantage of the forfeiture.

BYLES, J.—I am of the same opinion. I apprehend it is a sovereign rule in the construction of all written documents, to give effect to the intention of the parties as expressed in the instrument itself, and to give effect if possible to every word, or at all events to every provision. It is plain that the landlord meant *to have the security of the land for the performance of the stipulations [*428 contained in the agreement. It is true there is no covenant or condition, strictly so called, to which the proviso for re-entry can apply. What, then, are we to do? Are we to defeat the just intention of the parties by a rigid application of the rules of law? The case seems to fall very much within the quaint expressions of Lord Hobart in *The Earl of Clanrickard's Case*, Hob. 277, where that very learned judge says,—“I do exceedingly commend the judges that are curious and almost subtle, astuti (which is the word used in the Proverbs of Solomon in a good sense when it is to a good end), to invent reasons and means to make acts according to the just intent of the parties, and to avoid wrong and injury which by rigid rules might be wrought out of the act.” That being so, we are to be astute, if necessary, to put such a construction upon the words “covenants” and “conditions” as will best give effect to and carry out the intention of the parties to this agreement. All we do is to construe this to be an executory agreement, and to give the construction to the word covenant which it has received in many documents in ancient as well as in more modern times,—even so early as the celebrated covenant touching the thirty pieces of silver. If we do not so read the word, it becomes wholly inoperative. As to the word “condition,” I am not quite so clear. But, if necessary, I should feel no difficulty in putting the same sense upon it that I am disposed to put on the word “covenant.”

KEATING, J.—I am of the same opinion: and I feel that I cannot add anything to the reasons which have been given by my two learned Brothers.

Rule discharged.

**Hodgson*, in case it should be found necessary, prayed leave [*429 to appeal.

Harrison.—The point was not reserved absolutely, but only if the court should think it a case in which leave ought to have been reserved.

Hodgson.—The meaning of that obviously is, that the unsuccessful party shall not appeal as of right, unless the court see fit to grant a rule.

WILLES, J.—If we have power to stay further litigation by declining to grant leave to appeal, we will certainly do so. We will, however, confer with the Chief Justice upon it before deciding.

On a subsequent day, WILLES, J., intimated that the Chief Justice concurred with the rest of the court in thinking that the case was not one in which leave should be given to appeal.

Leave to appeal refused.(a)

(a) This qualified sort of leave to move has been productive of much mischief: and on one occasion the Chief Justice intimated his disapprobation of the practice. Suppose the rule had been made absolute, would the plaintiff have been deprived of his right to appeal?

A notice of appeal has been lodged with the Masters.

*430] *CAMERON v. THE CHARING CROSS RAILWAY COMPANY. May 4.

BOURHILL v. SAME.

1. Held,—upon the authority of *Chamberlain v. The West End of London and Crystal Palace Railway Company*, 2 Best & Smith 605 (in error, 617), and *Senior v. The Metropolitan Railway Company*, 2 Hurlst. & Colt. 258,—that loss of trade occasioned by the obstruction of a passage leading to a thoroughfare in which the claimant's shop is situate, whereby customers were prevented from coming there, is a particular damage in respect of which the party is entitled to compensation under the Lands Clauses Consolidation Act, 1845.

2. Held, also, that "the nature of the interest in such lands, in respect of which the party claims compensation" is sufficiently described in such a notice as the following,—“I, A. B., do hereby give you notice that I am *the occupier* of a dwelling-house, bake-house, and shop, situate, &c., and which said premises are used by me for carrying on therein my business as a baker, and that you have during and in consequence of the construction of, &c., injuriously affected my said dwelling-house, bake-house, and shop, and occasioned loss and damage to me in my business, by the blocking up the passage,” &c. (a public way), “and thereby preventing the passing of customers to my said bake-house and shop, and causing a great diminution in my business: and I give you notice that I claim 300*l.*” &c.; and that it was not necessary to go on to describe the precise legal interest which the claimant had in the premises, whether as leaseholder, tenant from year to year, &c., &c.

THESE were actions brought by the plaintiffs respectively to recover damages from the Charing Cross Railway Company under the 68th section of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), for injuries sustained by them in their trade of bakers, by reason of the obstruction by the company in the course of the construction of their station at Charing Cross of a public passage leading from Duke Street, Adelphi, through the market formerly called Hungerford Market, and Craven Street, to Northumberland Street, Strand, and thence to Scotland Yard and Whitehall Place. The place of business of the first-named plaintiff was in Duke Street; that of the other plaintiff in Northumberland Street. Their complaint was, the loss of business from casual customers who but for the stoppage of the passage in question would have passed that way, having been wholly prevented from so doing from the 22d of September, 1862, until the 23d of October, 1863, when a new, and as was alleged, a less commodious passage was opened by the defendants in substitution for the former one.

Each of the plaintiffs had prior to the bringing of his action given
*431] the company a notice, pursuant to the *68th section of the Lands Clauses Consolidation Act, 1845,(a) in the following form:—

(a) Which enacts, that, “If any party shall be entitled to any compensation in respect of any lands, or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction under the provisions of this or the special act, or any act incorporated therewith, and if the compensation claimed in such case shall exceed the sum of 50*l.*, such party may have the same settled either by arbitration or by the verdict of a jury as he shall think fit; and if such party desire to have the same settled by arbitration, it shall be lawful for him to give notice in writing to the promoters of the undertaking of such his desire, stating in such notice *the nature of the interest in such lands in respect of which he claims compensation*, and the amount of the compensation so claimed therein; and, unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and shall enter into a written agreement for that purpose within twenty-one days after the receipt of any such notice from any party so entitled, the same shall be settled by arbitration in the manner herein provided; or, if the party so entitled as aforesaid desire to have such question of compensation

"I the undersigned Charles Cameron, do hereby give you notice that I am *the occupier* of a dwelling-house, bake-house, and shop, situate and being No. 16, *Duke Street, Adelphi, in the parish [*432 of St. Martin-in-the-Fields, in the county of Middlesex, and which said premises are used by me for carrying on therein my business as a baker, and that you have during and in consequence of the construction of the railway called 'The Charing Cross Railway,' and other the works authorized by the Charing Cross Railway Act, 1859 (22 & 23 Vict. c. lxxxi.), injuriously affected my said dwelling-house, bake-house, and shop, and occasioned loss and damage to me in my business, by the blocking up the passage or footway leading from Duke Street, Adelphi, into and through Hungerford Market, and the passage or footway leading from Hungerford Market to Craven Street and Northumberland Street (being some or one of the roads or accesses to Duke Street aforesaid), and thereby preventing the passing of customers to my said bake-house and shop, and causing a great diminution in my business; and I give you notice that I claim the sum of 300*l.* as the compensation to be paid to me for the loss and damage which I have already sustained and which I shall sustain, and the damage and injury done to my said dwelling-house, bake-house, and shop by the making of the said railway and the execution of the works thereof, and that, in case you the said company shall dispute the said claim for compensation, it is my desire to have the amount of such compensation settled by a jury in the manner mentioned in and according to the Lands Clauses Consolidation Act, 1845. Dated this 19th day of October, 1863."

The company having failed to issue their warrants to the sheriff to summon juries to assess the compensation within the twenty-one days limited by the statute, these actions were brought.

The declaration in the first action was as follows:—

That the defendants are the company incorporated *by the [*433 Charing Cross Railway Act, 1859 (22 & 23 Vict. c. lxxxi.), and, the plaintiff being a party entitled to compensation *in respect of an interest in certain tenements*, being a dwelling-house, bake-house, and shop which were injuriously affected by the execution of the works by the said act authorized to be erected, and for which the defendants, who were and are the parties empowered to execute the said works, had not made satisfaction to the plaintiff under the provisions of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), or of the said act in the first part of the declaration mentioned, or of any act incorporated therewith; and the compensation claimed by the plaintiff in respect of *his interest in the said tenements* exceeding the sum of 50*l.*, and the plaintiff desiring to have the question of the said compensation settled by a jury, gave notice in writing of such his desire to the defendants, stating in the said notice *the nature of his interest in*

settled by a jury, it shall be lawful for him to give notice in writing of such his desire to the promoters of the undertaking, stating such particulars as aforesaid; and, unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and enter into a written agreement for that purpose, they shall within twenty-one days after the receipt of such notice issue their warrant to the sheriff to summon a jury for settling the same, in the manner herein provided; and, in default thereof, they shall be liable to pay to the party so entitled as aforesaid the amount of compensation so claimed, and the same may be recovered by him, with costs, by action in any of the superior courts."

*the said tenements in respect of which he claimed compensation, and the amount of compensation so claimed by him therein, to wit, 300*l*.; and the defendants were not willing to pay the amount of compensation so claimed, nor did they enter into a written agreement for that purpose, nor did they, within twenty-one days after the receipt by them of the said notice, issue their warrant to the sheriff to summon a jury for settling the same, in the manner provided in the Lands Clauses Consolidation Act, 1845, but made default in so doing; and by reason of such default, and by force of the statute in such case made and provided, the defendants became and are liable to pay to the plaintiff, being so entitled as aforesaid, the amount of compensation so claimed by him as aforesaid; and all conditions were fulfilled, and all things were done and happened, and all times elapsed, necessary to entitle* *434] *the plaintiff to maintain this action to recover *the last-mentioned sum from the defendants: yet the defendants had not paid the said amount of compensation to the plaintiff: claim 300*l*.*

The defendants pleaded,—first, that the plaintiff did not give the defendants such notice as in the declaration alleged,—secondly, that the said dwelling-house, bake-house, and shop were not, nor was either of them, or any part thereof, respectively, or the plaintiff's interest therein, or in any part thereof respectively, injuriously affected within the meaning of the said acts of parliament, nor was nor is the plaintiff entitled to compensation under the provisions of the said acts of parliament, in respect of the same having been so injuriously affected. Issue thereon.

The causes were tried before Erle, C. J., at the sittings at Westminster after Hilary Term. The plaintiffs rested their claim for compensation upon the loss of customers during the period of the stoppage of the passage for the construction of the company's works. .

On the part of the defendants it was submitted that that was not a head of damage for which the Lands Clauses Consolidation Act, 1845, gave the claimants a right to compensation, but that the statute only applied to a case where an actual injury was done to land,—in its widest sense; that the work complained of was done under the authority of the special act; (a) *and that the notice was not sufficiently specific to enable the company to estimate the amount of injury sustained by the claimants. *435]

It appeared that Cameron held his premises under a lease for twenty-one years, of which twelve were unexpired, and Bourhill for a shorter period.

His Lordship overruled the objections, but reserved leave to the defendants to move to enter a nonsuit, with an understanding that they were not to appeal unless the court should think the case a fit one for an appeal.

(a) 22 & 23 Vict., c. lxxxi., s. xcvii, which enacts that "the company shall, before opening their line for public traffic, construct a good and convenient footway not less than twenty feet in width, in a tunnel of which the crown of the arch shall not be less than 16 feet from the ground, such footway and tunnel to extend from the point at which the works of the company may intersect the passage or footway now leading from Northumberland Street and Craven Street, Strand, into Hungerford Market, both in the county of Middlesex, to the point at which the works of the company may intersect the passage or footway leading from Hungerford Market to Duke Street, Adelphi, or to such other point as may be approved in writing by the commissioners of woods and forests, &c.

A verdict was thereupon taken for Cameron for 300*l.*, and for Bourhill for 100*l.*

Lush, Q. C., on a former day in this term, obtained a rule to enter a nonsuit, on the grounds,—“first, that the plaintiff was not entitled to compensation for loss of trade,—secondly, that the notice was insufficient, in not sufficiently stating the nature of the plaintiffs’ interest in the premises.” He referred to *Wilks v. The Hungerford Market Company*, 2 N. C. 281, 4 Scott 446.

Giffard and *Maclachlan* now showed cause.—Two points were reserved,—first, whether this was a case for compensation under the 68th section of the Lands Clauses Consolidation Act, 1845,—secondly, whether the notice sufficiently described the nature of the interest in respect of which the compensation was claimed. The first point has already been set at rest, so far at least as this court is concerned, by a case in the Court of Queen’s Bench and Exchequer Chamber, of *Chamberlain v. The West End of London and Crystal Palace Railway*, 2 Best & Smith 605, 617 (E. C. L. R. vol. 110), *and another [*436 in the Exchequer, of *Senior v. The Metropolitan Railway Company*, 2 Hurlst. & Colt. 258, which have been followed by a still more recent one of *Rickett v. The Metropolitan Railway Company*, which was decided in the Court of Queen’s Bench in the course of the present term. In *Chamberlain v. The West End of London and Crystal Palace Railway Company*, the declaration stated that the defendants, a railway company, under the powers of their act, took for the purposes of their railway a portion of a highway from London to Wandsworth, and constructed the railway across it, and a deviation road and bridge over the railway, and by the execution of the railway and works houses of the plaintiff were injuriously affected; and set out proceedings in an arbitration under the Lands Clauses Consolidation Act, 1845, by which the umpire appointed by the arbitrators awarded compensation to the plaintiff. Plea, setting out the form of the appointment of the arbitrator on the part of the defendants, and the award which recited the notice of the plaintiff to the defendants that, by the execution of the railway and works, they had injuriously affected certain houses of which the plaintiff was lessee, being four houses on the highway, and eight other houses which, at the time of the execution of the works, were in the course of erection for the purpose of being used as dwelling-houses, fronting a new road running at right angles to the highway, and found, that, by reason of the obstruction of the highway, by the construction of the railway across the same, the access to the houses of the plaintiff was, notwithstanding the substitution of the deviation road, rendered less convenient for the occupiers, and many persons would be prevented from passing the same, and the houses had thereby been rendered less suitable for being used and occupied as shops, and the value of the houses had *been greatly diminished. On demurrer, the Court of Queen’s Bench held,—and their decision was affirmed by the Exchequer [*437 Chamber,—that the houses of the plaintiff were injuriously affected within the Lands Clauses Consolidation Act, 1845, s. 68, and the Railways Clauses Consolidation Act, 1845, s. 6, and therefore the plaintiff was entitled to compensation. And in *Senior v. The Metropolitan Railway Company*, 2 Hurlst. & Colt. 258, it was held by the

Court of Exchequer that loss of trade occasioned by the obstruction of a highway during the execution of the works of a railway company, is an injurious affecting of the tradesman's interest in his premises, which entitles him to compensation under s. 68 of the Lands Clauses Consolidation Act, 1845. Pollock, C. B., there says: "Loss of trade is loss of goodwill; and goodwill is part of the value of the plaintiff's interest in the premises: and it is sufficient to say that loss of trade is an injury to the value of the land itself, and therefore the subject of compensation under the Lands Clauses Consolidation Act." And Bramwell, B., said: "In the first place, I think this case is decided by the case of *Chamberlain v. The West End of London and Crystal Palace Railway Company*. Secondly, I think it is decided by what I have always understood to be the principle of these cases, that, where premises are damaged under such circumstances that, but for the parliamentary powers, an action would be maintainable against the company, the party interested in the premises is entitled to compensation under the Lands Clauses Consolidation Act. It seems to me that it is an injurious affecting of the premises to obstruct the access to them so that the business there carried on cannot be carried on so profitably. Therefore, both on principle and authority, I think the plaintiff is entitled to recover." Then, what is the principle upon *438] which compensation in these cases is to be awarded? The injurious affecting complained of, is, that, by means of the stoppage of the way described in the notice and in the declaration, the access of customers to the plaintiff's shop was prevented and the profits of his trade diminished. The moment it is admitted that artificial circumstances constantly operating give to premises an artificial and enhanced value, any unauthorized act whereby that artificial value is diminished or destroyed gives a cause of action, and consequently a right to compensation under the Lands Clauses Consolidation Act. In the *East and West India Docks and Birmingham Junction Railway Company v. Gattke*, 3 M'N. & G. 155, it was held that the words "injuriously affected," in the 68th section of the Lands Clauses Consolidation Act, 1845, comprehend cases of injury independent of taking land, and are not limited to damage sustained by persons whose lands or part of whose lands are taken, used, or directly interfered with: and that the right to compensation extends to and may be asserted in respect of consequential damage. Lord Truro, C., there says that "the rules of construction which have been applied to railway acts and other acts of the same nature, are, that they are to be liberally expounded in favour of the public, and strictly as against the company." In *Glover v. The North Staffordshire Railway Company*, 16 Q. B. 912 (E. C. L. R. vol. 71), G. was owner of land appertaining to which was a right of way over a road. A railway company, under the provisions of their act, constructed a railway crossing the road on a level, and erected gates on the road at each side of the railway, which were kept locked, under the provisions of the act, the servant of the company (who resided between one and two hundred yards of the gate) keeping a key, and G. also having a key. From *439] the nature of the ground, a person crossing the railway by the road would not see a train coming in one direction till it was at a distance ordinarily passed in seventeen seconds. G. claimed

from the company more than 50%, on the ground that his land was "injuriously affected," and required them, in case they did not pay, to issue a warrant for a jury in twenty-one days. The company not having paid or issued their warrant, the defendant brought debt for the amount claimed; and issue was joined on a traverse of the allegation that the land was injuriously affected. The jury found the above facts specially, and also that the land was depreciated in value: and the court held that the plaintiff was entitled to recover.^(a) In the case of *Re Penny and The South Eastern Railway Company*, 7 Ellis & B. 660 (E. C. L. R. vol. 90), the Court of Queen's Bench intimated an opinion that injury arising from vibration from the passage of ballast trucks during the construction of a railway was a proper ground for compensation "because an action could have been maintained before the company had acquired their statutory authority." And in giving the judgment of the court of error in *Chamberlain v. The West End of London and Crystal Palace Railway Company*, 2 Best & Smith 636 (E. C. L. R. vol. 110), Erle, C. J., says: "I think that the fact found by the umpire, that the plaintiff's houses have been injuriously affected, is a finding that he has suffered 'particular damnification;' and he finds specially how the injurious affecting would be occasioned, viz. that by the obstruction to the thoroughfare the number of persons passing by the plaintiff's houses would be diminished, and *consequently the prospect of customers to the occupiers of the houses in respect of any branches of industry carried on in [*440 them would be injured. Therefore I am of opinion that a particular damage to the plaintiff by the obstruction of the highway is made out." That is a far more speculative damage than that relied on here. [ERLE, C. J.—*Pain v. Partridge*, 1 Ld. Raym. 493, n., 3 Mod. 289, 1 Show. 243, 255, 1 Salk. 12, Comb. 180, Carth. 191, Holt 6, lays down a definite principle.^(b)] In *Wilks v. The Hungerford Market Company*, 2 N. C. 281, 2 Scott 446, the injury complained of was merely of a temporary nature. Goodwill is a valuable thing, and may be rateable: *The King v. Bradford*, 4 M. & Sel. 317. Then, as to the notice. The 68th section requires the claimant to state "the nature of the interest in such lands in respect of which he claims compensation." Is not that sufficiently complied with by stating that the party claims as "occupier" of a shop for the loss occasioned to him by his customers being diverted from the accustomed channel? If the company were about to take the plaintiff's premises, they would of course require to be informed whether he held as tenant from year to year or under a lease; and, if the latter, it would be necessary that they should be informed for what term he held, and under what covenants. But, where the complaint is of an injury to the party as occupier, by the destruction or interruption of his trade, it is enough to show that the injury accrues to him from his connection with the premises as occupier. The object is to give such information to the

(a) See *The Caledonian Railway Company v. Ogilvy*, 2 Macq. 229, where it was held by the House of Lords that a crossing a road on a level is "a grievance to be endured without complaint by private persons, in consideration of the benefit gained by the public."

(b) And see *Barber v. The Nottingham and Grantham Railway and Canal Company*, 15 C. B. N. S. 726 (E. C. L. R. vol. 109), and *Wood v. The Stourbridge Railway Company*, ante, p. 223.

company as to put them on inquiry. The enhanced value of business premises depends upon such an infinite variety of circumstances, that *441] it would be impossible to give a notice which *would exclude the necessity for inquiry. Under the 6 & 7 Vict. c. 18, in describing the nature of a qualification to vote, "tenant," or "occupier," has been held sufficient: Birks, app., Allison, resp., 13 C. B. N. S. 12, 24; Howitt, app., Stephens, resp., 5 C. B. N. S. 30 (E. C. L. R. vol. 94). The defendants could not suppose from this notice that the claimant was merely a tenant from year to year; for, in that case, the amount would have to be ascertained by justices (s. 121): *The Queen v. The Manchester, Sheffield, and Lincolnshire Railway Company*, 4 Ellis & B. 88 (E. C. L. R. vol. 82): and it must be presumed that the plaintiff knew the law. [BYLES, J.—Is a man to lose his right to compensation because he has failed accurately to describe the nature of his interest,—which might be such as to require the intellect of Lord St. Leonards accurately to describe?] It is enough if the notice gives the company such fair information as to enable them to ascertain the justice and propriety of the claim. If *particulars* of the interest are required, where is it to stop? The description here would be abundantly sufficient in an ordinary action. [WILLES, J.—A reversioner could not bring an action or make a claim in respect of "goodwill:" therefore, "occupier" would seem to be the proper description.] Loss of customers is necessarily occupation damage.

Lush, Q. C., *Shield*, and *H. Hills*, in support of the rule.—The argument on the other side rests upon a misapplication of the rule, that, wherever an action would have lain for the injury if done without the sanction of an act of parliament, it is a case for compensation under the Lands Clauses Consolidation Act, 1845. That, however, is only a negative test. It is submitted, that, upon the true construction *442] of the statute, compensation is only due under it where *land* *or an interest in land is damaged. There must be *damnum* and *injuria*. No compensation is claimable even where land or an interest in land is damaged, unless the damage would have been the subject of an action against the party doing that which causes it, if done without the sanction of an act of parliament. It may be conceded that the case of *Senior v. The Metropolitan Railway Company*, 2 Hurlst. & N. 258, is in point against the defendants: but it professes to be founded entirely upon *Chamberlain v. The West End of London and Crystal Palace Railway Company*, 2 Best & Smith 605 (E. C. L. R. vol. 110); whereas, the two cases are totally different. In each case the action would have lain independently of the statute: but, in the last-mentioned case, the person claiming was not tenant or occupier, but the owner of certain houses in the course of construction: there was a direct injury to the houses by the raising of the road. No doubt the decision there was correct. But it has no application here: and if the defendants can satisfy this court that it differs essentially from *Senior v. The Metropolitan Railway Company*, they will not hold that it stands in the way of their giving an independent judgment upon the question. [ERLE, C. J.—If you wish to impugn the decision of the Court of Exchequer, that must be done in a court of error. We cannot put our judgment in conflict with that of a court of co-ordinate jurisdiction. We must hold ourselves bound by

authority.] Then, it is submitted, the notice is not a sufficient compliance with the 68th section of the act. The earlier sections apply to dealings with lands before the company take possession. The 18th and subsequent sections, down to the 67th, apply to cases where the company take the land. In their notice under s. 18, the company are to demand from the parties whose lands they mean to take "the particulars of their estate and *interest, in such lands, and of the [*443 claims made by them in respect thereof." Similar words are found in s. 21. The 84th and subsequent sections also speak of "lands" and "interest in lands." The 68th section applies to that as well as to lands "injuriously affected." The company have only twenty-one days within which to determine whether or not they will submit to the demand. It is plain that the legislature intended that they should have full information so as to enable them to make up their minds. Under s. 38, the company are bound to make a tender of the sum which they are willing to give. The provision as to costs applies as well to that section as to the 68th.(a) [BYLES, J.—It cannot be that the claimant is bound so to frame his notice as to render it unnecessary for the company to make inquiry. Is he bound to state in his notice the length of term, the amount of rent, and any restrictive covenants?] He is bound to give the company such a notice as will fairly enable them to ascertain the amount of injury he has sustained. [WILLES, J.—It may be that his lease contains a covenant not to carry on a particular trade upon the premises; but that, in consequence of the deterioration of the neighbourhood, he is permitted without interruption from his landlord to carry on that trade.] The nature of the interest, the amount of the rent, and any other matter that it is material the company should know, should be stated. The claimant must state whether he is tenant for years (and how many), tenant in fee, or for life. He need not probably give such precise information as will dispense with all inquiry. [BYLES, J.—Suppose the lease is granted under a power, and the execution of the power is doubtful?] That would be a question of title. In *Falconer v. The Aberdeen Railway *Company*, 15 Court of Sess. Ca. 352, 2 S. [*444 M. & P. 180 (cited in Taylor's note to the Consolidation Acts, p. 225), under the 36th section of the Scotch Lands Clauses Consolidation Act (8 & 9 Vict. c. 19), a notice claiming, inter alia, "70l. as the yearly and permanent damages during the remaining years of the said lease from Martinmas next" (without reducing this claim to a stated sum for the entire interest), was held bad. What difference can there be in this respect between a claim for lands taken and a claim for the injuriously affecting land? To enable them to act upon the notice, the company must have data whereby to estimate the amount of damage. The registration cases referred to are totally inapplicable: the party's title to be on the register is investigated before the revising-barrister. [WILLES, J., referred to s. 122, which enacts, that, "if any party, having a greater interest than as tenant at will, claim compensation in respect of any unexpired term or interest under any lease or grant of any such lands, the promoters of the undertaking may require such party to produce the lease or grant in

(a) See *Richardson v. The South Eastern Railway Company*, 11 C. B. 154 (E. C. L. R. vol. 73).

respect of which such claim shall be made, or the best evidence thereof in his power; and if, after demand made in writing by the promoters of the undertaking, such lease or grant, or such best evidence thereof, be not produced within twenty-one days, the party so claiming compensation shall be considered as a tenant holding only from year to year, and be entitled to compensation accordingly."'] If this be the proper subject of a claim for compensation, it may be that there are two hundred persons on the line of streets damnified in the same way, and the company may have received claims from all of them on the same day: if they are to be put to inquire into each case, the time limited for the purpose is obviously wholly inadequate. This may be within the company's line of deviation. It might be worth *445] *their while to buy the party's premises. [ERLE, C. J.—This must be out of the line of deviation. And, if it were not, it is quite new to me to hear that the company may compulsorily take all the land within their line of deviation. *MacLachlan* referred to *Knapp v. The London, Chatham and Dover Railway Company*, 32 Law J., Exch. 236.]

ERLE, C. J.—I am of opinion that these rules should be discharged. The railway company has in this case brought under our consideration a very substantial point, and one upon which I hope the proper tribunal will one day lay down some definite and precise rule, viz. what are the true limits within which claims against railway and other companies for compensation in respect of damage caused by their works are to be confined. The argument on the part of the company has been, that the statute intended to give the claimant compensation for injury done to house or land, and not for loss of custom, which is a mere personal injury. We, however, decide against that argument, on the ground that the matter has already undergone consideration in two courts of co-ordinate jurisdiction, by whose judgment we are bound. The other point is, whether the notice under s. 68 of the Lands Clauses Consolidation Act, 1845, of the injurious affecting of the plaintiff's "land" was a sufficient notice. The statute requires the party claiming to be entitled to compensation "in respect of any lands, or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works," to give the undertakers a notice, in which he shall state "the nature of the interest in such lands in respect of which he claims compensation, and the amount of the compensation so claimed therein." This being done, *446] the company are within twenty-one days to make up *their minds whether they will pay the amount so claimed or issue their warrant to the sheriff to summon a jury for settling the same, at the risk of incurring a large amount of costs in one event. When the claim is for compensation for the stoppage of a public thoroughfare, it is obvious that the injury complained of may have been sustained by the occupiers of all the houses within a radius of a quarter of a mile or more of the alleged obstruction. I am inclined to go very much with Mr. Lush in his suggestion that it is the duty of the party claiming compensation to give the company such information as will enable them to form a judgment as to the fairness and propriety of the claim that is made upon it. Here, the party says "I am the occupier of a dwelling-house, bake-house, and shop, situate," &c.

"and which said premises are used by me for carrying on therein my business as a baker." It certainly is the barest statement that can possibly pass. I cannot, however, bring my mind to nonsuit the plaintiff, though I entertain great doubt. The notice informs the company that the claimant carries on the business of a baker, and that, in consequence of the construction of their works and the blocking up the passage, customers were prevented from coming to his shop. Coupling this with the former part of the notice, it may pass muster. It is impossible that these notices can be so framed as to enable the company to obtain an accurate or even an approximate estimate from a surveyor. If the party had stated,—as the fact was in one of these cases,—that his lease for twenty-one years had yet twelve years to run, unless he went on to say what was the rent, and what the covenants which the lease contained, no surveyor could form an opinion as to the fairness of the claim. And it is quite clear that the claimant is not bound to give in his notice all the *details [*447 which a surveyor would require. Where, then, is the line to be drawn? Reading the whole of the document together, I do not feel justified in holding that the plaintiff ought to be nonsuited by reason of the insufficiency of the notice.

WILLES, J.—I am of the same opinion. The first point is concluded by authorities which I not only feel myself bound by, but to which I give my entire assent. Damage to a man's interest in land necessarily includes damage to the business which he carries on upon the land, by diverting it from its accustomed channel. Such an interest is not merely personal: it is an interest which a man enjoys in respect of the land,—a reasonable expectation of profit from the exercise of his abilities in some particular place by carrying on business there. That reasonable expectation of profit is commonly called "goodwill," and is a marketable thing. I must confess I do not see why a man should not recover damages for being deprived of that. This is nothing more than is to be found in Comyns's Digest, *Action upon the Case for a Nuisance* (C.), where it is said with some doubt, that an action will lie, "if by stopping the highway a man is constrained to use a longer and more difficult way: Dan. 173: or if by stopping the way the sale of his coals is hindered in an adjacent colliery." If he had said that buyers were prevented from coming, it seems to have been agreed that the action would lie. The case (*Iveson v. Moore*, 1 Salk. 15, 1 Lord. Raym. 486, Holt 10, Com. 58, 12 Mod. 262, Carth. 451, Comb. 480, Willes 74 n.) is so explained in *Chamberlain v. The West End of London and Crystal Palace Railway Company*, 2 Best & Smith 605 (E. C. L. R. vol. 110), where the matter was thoroughly considered. Then, if an action would have lain for this injury against a person doing it without the sanction *of an act of parliament, [*448 the party injured is entitled to claim compensation for it under the Lands Clauses Consolidation Act. The next question is, whether the notice given was sufficient,—whether the claimant has complied with the condition which the statute has imposed upon persons making claims against railway companies. If he has, I apprehend it is not for the court to say that he has not done it sufficiently or in the most convenient possible manner. The party is required to state in his notice "the nature of the interest in such lands in respect of

which he claims compensation." Now, it is obvious that such an interest as is here claimed belongs to the occupier of the premises for the time being. It is not a claim on the part of the owner of the land because the house is made less fit for business purposes: nor is it a claim for damages by reason of the access to the property generally being made less convenient: but it is a claim specifically addressed to the loss sustained by the baker, the present occupier of the shop, in consequence of his customers being prevented from coming that way. That is a loss of a reasonable expectation of profit accruing from his business. In his notice he describes the nature of his interest thus,—
 "I am the occupier of a dwelling-house, bake-house, and shop, in which I carry on my business as a baker." The compensation to be paid to him would not be such as would be given to him in respect of his being tenant for life, or tenant in fee, or for years, but in respect of his being *occupier*. It would be extraordinary if we were to hold the notice to be bad, unless we were prepared to state what form would be better: and I think no notice would be better which did not enable the company to determine what amount of compensation the claimant is entitled to: but it is not suggested that they would be
 *449] in a better condition to do this if the *claimant had stated in his notice the precise legal interest which he had in the premises. I at one time felt some doubt whether this notice should not have stated that the claimant held under a lease, because the 122d section of the statute provides, that, "if any party having a greater interest than as tenant at will, claim compensation in respect of any unexpired term or interest under any lease or grant of any such lands, the promoters of the undertaking may require such party to produce the lease or grant in respect of which such claim shall be made, or the best evidence thereof in his power; and if, after demand made in writing by the promoters of the undertaking, such lease or grant, or such best evidence thereof, be not produced within twenty-one days, the party so claiming compensation shall be considered as a tenant holding only from year to year, and be entitled to compensation accordingly." But, in a case before Mellor, J., in the bail court, *The Queen v. The Sheriff of Middlesex, Re Somers v. The Metropolitan Railway Company*, 31 Law J., Q. B. 261 (which is not affected by the other two cases cited), it was held that that does not apply to the case of a proceeding under s. 68, where lands are injuriously affected, but that that section falls among that class which deals with compensation where part of the land is actually taken by the company. Upon the whole, I think the interest in respect of injury to which the plaintiff claims compensation here is sufficiently stated in this notice; and I do not see my way to point out how it could be more specifically stated.

BYLES, J.—As to the first point, I think we are not at liberty to reconsider it. So far as this court is concerned, it is concluded by the cases of *Senior v. The Metropolitan Railway Company*, 2 Hurlst. & Colt. *258, and *Chamberlain v. The West End of London*
 *450] and *Crystal Palace Railway Company*, 2 Best & Smith 605 (E. C. L. R. vol. 110): and I do not mean to intimate any doubt as to the correctness of those decisions. As to the other point, I must admit my mind has wavered during the argument: but, upon the

whole, I have come to the conclusion that the notice is sufficient. It is to be observed, that, in the 18th section of the statute, which applies to lands to be taken by the company, where something more is required than is required here, the language used is different; the parties are required to give "the particulars of their estate and interest in such lands and of the claims made by them in respect thereof." Contrast that with the language of s. 68,—*"the nature of the interest in such lands in respect of which he claims compensation."* The language used is not *"describe"* or *"give the particulars of"* the interest in respect of which you claim compensation; but merely *"state what its nature is."* And this, be it observed, is a notice required to be given by common people, and after their lands have been taken or injuriously affected in such a manner that but for the statute an ordinary action would have lain. The statute says,—*"State the nature of the interest in the land in respect of which you claim compensation, and the amount of compensation you claim."* What does the plaintiff here say? He says,—*"I am the occupier of a dwelling-house, bake-house, and shop, which are used by me for carrying on therein my business as a baker; and you have, during and in consequence of the construction of your works, injuriously affected my said dwelling-house, bake-house, and shop, and occasioned loss and damage to me in my business, by blocking up a certain passage, and thereby preventing the passing of customers to my said bake-house and shop, and causing a great diminution in my business: and I claim so much."* I think that any of the Queen's subjects, reading that notice, would say that the claimant meant, not that he was owner in fee or in tail, but that he was an occupying tenant; and we have a right to read it as any ordinary person would read it, and to construe it *ut res magis valeat quam pereat*. Mr. Lush admits that the notice need not be so precise and particular as to preclude all necessity for inquiry. If so, the company have got all they would have had if the notice had been more specific. I think it was a perfectly correct notice.

KEATING, J.—As to the first point, not only do I bow to the authority of the cases in the courts of Exchequer and Queen's Bench, but I venture to say that I entirely assent to them. Upon the other point I must confess I have, in common with the other members of the court, entertained great doubts. It certainly is not easy to draw the line. Mr. Lush felt a difficulty in answering a question put to him as to what form of notice would be sufficient to enable the company to do that which by the vagueness of this notice they are deprived of the opportunity of doing. The distinction, I think, was well pointed out by Mr. Maclachlan in his able argument, between the notice required where the company give notice of their intention to take land, and the notice in a case like this, where the claim is in respect of an injury which could only affect the occupying tenant. It could scarcely have been meant that the claimant should be bound to such accuracy in his notice that he is to be nonsuited if he makes a mistake in describing it. Upon the whole, I agree with the rest of the court in thinking that this notice was sufficient, and that the rule should be discharged.

This judgment of course disposes of the rule in *Bourhill v. The Charing Cross Railway Company* also. Rules discharged.

*452] ***SHRUBSOLE and Another, Assignees of TOMLIN, a Bankrupt, v. SUSSAMS.** April 17.

A., an innkeeper at Sheerness, being indebted to B., under what the jury thought sufficient pressure, on the 30th of May employed his own attorney to prepare a bill of sale of all his effects in favour of B., to secure an existing debt and a small further advance (the amount being about a fair equivalent for the value of the goods), and sent it to B. On the 10th of July B. sent a man to A.'s premises to paint out A.'s name, and on the 13th went down to Sheerness and took possession, leaving A. there to manage the concern on his behalf. On the 15th A. filed a petition in bankruptcy, and on the 16th was duly adjudged bankrupt.

In an action by the assignees to recover the value of the goods thus conveyed,—the jury having found that the transaction was *bonâ fide*, and that possession was really and notoriously taken by B., prior to the bankruptcy:—Held, that the transaction could not be avoided either as an act of bankruptcy (there being no relation) or as a fraudulent preference; and that the goods were not in the order and disposition of A. at the time of his bankruptcy.

THIS was an action of trover brought by the assignees of one Tomlin, a bankrupt, to recover the value of certain goods of the bankrupt of which the defendant had possessed himself under the circumstances hereinafter mentioned. Pleas, not guilty, and not possessed.

The cause was tried before Byles, J., at the sittings in London after last Term, when the following facts appeared in evidence:—Tomlin, who kept the Star inn at Sheerness, being indebted to Sussams, who was pressing him for payment, and requiring a further advance, on the 30th of May, 1863, went to his own solicitor, and instructed him to draw a bill of sale conveying to Sussams the whole of his furniture and stock in trade at the inn (which appeared to be substantially all the property he possessed), in consideration of a past debt and future advances. The bill of sale was accordingly drawn and duly executed and filed, but, upon the face of it, it purported only to be for a past consideration. Tomlin took the bill of sale to Sussams, and on Friday, the 10th of July, Sussams sent down a man to paint out Tomlin's name: but no new name was put up. On Monday, the 13th, Sussams went to the inn, and, as he swore, took possession, retaining Tomlin to manage the business for him. On the 15th (Wednesday) Tomlin filed a petition in bankruptcy, and on Thursday the 16th was adjudicated bankrupt: and the plaintiffs were afterwards appointed
*458] assignees. *It appeared that the debt for which the bill of sale was given was about a fair equivalent for the value of the goods comprised in it.

At the close of the defendant's case, the plaintiffs' counsel proposed to call witnesses for the purpose of showing that the defendant's taking possession was merely colourable.

The learned judge declined to receive the evidence.

On the part of the plaintiff it was submitted that the bill of sale was fraudulent and void as against the assignees, and that they were entitled to recover the goods as being in the possession of the bankrupt at the time of the bankruptcy with the consent of the true owner.

The learned judge left it to the jury to say whether the bill of sale was *bonâ fide* given, and whether possession had been really and notoriously taken by Sussams before the bankruptcy.

The jury returned a verdict for the defendant.

Huddleston, Q. C., now moved, pursuant to leave, to enter a verdict for the plaintiffs for 40s. (the goods to be given up), or for a new trial on the grounds of misdirection and the improper rejection of evidence, and also on the ground that the verdict was against the weight of evidence. He submitted that the bill of sale was fraudulent and void as against the assignees, though there was no proof of the existence of any petitioning-creditor's debt at the time it was given: notes to *Cooper v. Chitty*, 1 Smith's Leading Cases, 5th edit., 436 et seq. [WILLES, J., referred to *Pennell v. Reynolds*, 11 C. B. N. S. 709 (E. C. L. R. vol. 103), where it was held that an assignment by a trader of all his property and effects for a present advance of *part* of their value is not necessarily an act of bankruptcy.] No doubt, bona fides was a question for the jury: but the *circumstances here were [*454 pregnant to show that the whole transaction between Sussams and Tomlin was for the purpose of giving Sussams an advantage over the other creditors which the law does not sanction. The circumstance of Tomlin remaining in undisturbed possession raises a question under the 125th section of the 12 & 13 Vict. c. 106. In *Freshney v. Carvick*, 1 Hurlst. & N. 653, a trader by deed assigned his goods by way of mortgage, subject to a proviso that it should be lawful for him to hold and make use of the goods until default in payment of the money secured, after demand in writing: the mortgagee allowed the trader to continue in the possession of the goods until after his bankruptcy: and it was held that the goods were at the time of the bankruptcy in the order and disposition of the bankrupt with the consent of the true owner, within the meaning of the 125th section of the 12 & 13 Vict. c. 106. "The object of the act," says Martin, B., "is, that, if the true owner permits another person to have possession as reputed owner, he must take the consequences of it, and, in the event of a bankruptcy, the creditors become entitled to the goods." So, in *Spackman v. Miller*, 12 C. B. N. S. 659 (E. C. L. R. vol. 104),—which was mainly founded upon *Lingham v. Biggs*, 1 Bos. & P. 82,—W., a trader, by bill of sale dated the 14th of July, 1856, assigned all his stock and household furniture to the plaintiff as security for an advance of 100*l*. The deed contained a proviso, that, in case W., his executors, &c., should pay the plaintiff, his executors, &c., the 100*l*. on the 14th of July, 1866, or at such earlier day or time as the plaintiff, his executors, &c., should appoint for payment thereof in and by a notice in writing given to W., his executors, &c., twenty-four hours before the day or time so to be appointed for payment as aforesaid, and should in the meantime pay the interest half-yearly to *the plaintiff, his executors, &c., the deed should cease [*455 and be void. There was also a covenant by W. for payment of the 100*l*. and interest; and a further proviso, that, until default should have been made in payment of the 100*l*. at the day appointed for payment, or of the interest, after notice, it should be lawful for W., his executors, &c., to hold, make use of, and possess the goods assigned, without any hindrance or disturbance by the plaintiff, his executors, &c. W. continued in possession of the goods until the 19th of January, 1862, when he committed an act of bankruptcy. On the 21st, the plaintiff left at his dwelling-house a notice in writing

requiring payment of the 100*l.* and interest on the 23*d.* On the 22*d.* W. was adjudicated a bankrupt, and on the same day the messenger entered and took possession of the goods. It was held that the goods passed to the assignees of W., as goods in his possession, order, and disposition at the time of the bankruptcy, with the consent of the true owner, within s. 125. It is impossible to distinguish that case from this. Williams, J., there says: "The authorities cited by Mr. Pridcaux establish this, that the law will not allow a person who takes a bill of sale or mortgage of chattels to suffer the grantor or mortgagor to continue in the apparent ownership of them, without incurring the risk of their passing to his assignees, in the event of a bankruptcy; and that he cannot prevent that effect by introducing into the deed a clause of re-demise to the mortgagor. That, I think, may fairly be inferred to be the principle upon which the cases of *Freshney v. Carvick*, 1 Hurlst. & N. 653, and *Hornsby v. Miller*, 1 Ellis & E. 192 (E. C. L. R. vol. 72), were decided. But the case last referred to by my Brother Willes, *Bryson v. Wylie*, 1 Bos. & P. 83, n., is directly in point, and is altogether undistinguishable from the *456] present both in its facts and in principle. It shows *that the law will not allow the provision of the Bankrupt Act to be defeated by this sort of contrivance. And in this there is plainly good sense, because, where the mortgagee might at any time repossess himself of the goods upon giving twenty-four hours' notice, and does not choose to avail himself of that power, the goods are in substance in the possession of the bankrupt with the consent and permission of the true owner." [BYLES, J.—The contention was, whether in point of fact reputed ownership existed. That case shows only that reputed ownership may exist notwithstanding the relation of the parties as mortgagor and mortgagee.] Tomlin continued to carry on business before the world as he had formerly done. There was nothing to indicate a change of possession, except the mere fact of a paint-brush being passed over the name on the door. This is not like the case of the possession of a servant,—*Stafford v. Clark*, 1 Car. & P. 24 (E. C. L. R. vol. 12). [WILLES, J.—Whether there was reputed ownership, and whether there was consent, are totally different questions. You may assume here that there was consent.] There was no evidence to warrant the jury in coming to the conclusion that possession was really and *notoriously* taken by Sussams before the bankruptcy. Then, as to the rejection of evidence. The plaintiffs had no intimation that the defendant meant to set up that he had taken possession. When that fact came out in the course of the defendant's case, the plaintiffs tendered the evidence of the pot-boy and of other witnesses to show that the alleged taking possession was only colourable, and that everything about the place retained the same appearance as before the defendant went down on the Monday. [BYLES, J.—After the evidence which had been already given, I did not think I should be exercising a wise discretion in receiving the *457] evidence tendered at that stage of the cause: and I *certainly understood that it was withdrawn.] There was no intention on the part of the plaintiffs to withdraw the evidence.

ERLE, C. J.—I am of opinion that there should be no rule in this case. The adjudication here was upon the bankrupt's own petition:

and the verdict is sought to be impeached by reason of transactions which took place between the bankrupt and the defendant prior to the bankruptcy. It is said, in the first place, that the bill of sale was fraudulent and void as against the assignees, as being an assignment to the defendant of all the bankrupt's property with an evident contemplation of bankruptcy. But that alone, if value be given for it (and here there was an outstanding debt and a small advance), will not avoid the transaction. Comparing the value of the property with the consideration here, there is nothing to show that the transaction might not have been a perfectly valid one. It is not like a case where goods are obtained for half their value. Then it is said that the transaction amounted to a fraudulent preference,—the bill of sale having been prepared by the bankrupt's own solicitor upon his instructions. But I gather from the notes of the learned judge that this was the result of much previous pressure from the creditor. The point which was mainly pressed, was, that the goods were in the reputed ownership of the bankrupt at the time of the bankruptcy with the consent of the true owner. No doubt the goods were in the possession of Tomlin with the consent of Sussams: but, were they in his possession as reputed owner? It appears that the defendant had sent down a person to the premises to paint out Tomlin's name, and that he himself went there on the Monday prior to the bankruptcy, and arranged with Tomlin to continue upon the premises to carry on the [*458 *concern for him. The defendant was the real owner. He left the bankrupt in possession to continue the business until he could find a purchaser. That might have been fraudulent or not. It was a question for the jury: and it was left to them, no doubt with appropriate remarks, to say whether the defendant did really and notoriously take possession upon the Monday. The jury found for the defendant; and the learned judge does not report any dissatisfaction with the verdict. I therefore do not feel justified in interfering. As to the alleged improper rejection of evidence, I would only observe that it is always matter of discretion with the presiding judge whether he will or will not receive evidence in reply.

WILLES, J.—I am of the same opinion. The bill of sale is attacked upon several grounds. The first ground is that it was an assignment of all the available property of the bankrupt. That ground is clearly not maintainable. This deed was executed before the bankruptcy of Tomlin. Now, nothing can be clearer, upon the decisions, than that the doctrine of relation cannot affect a transaction of this sort, unless it is impeachable on the ground of a fraudulent preference. The plaintiffs cannot insist that this was a void deed as an act of bankruptcy. Unless, therefore, the deed is void by the statute of Elizabeth, it cannot be impeached at all. That statute fails the plaintiffs, because there is nothing upon the face of this deed to show fraud: and the relative value of the goods and of the consideration for the assignment negatives fraud. I adhere to what I said in *Pennell v. Reynolds*, 11 C. B. N. S. 722 (E. C. L. R. vol. 103), that an assignment by a trader of all his property and effects for a present advance of *part* of their value is not necessarily an act of bankruptcy: it is for the jury to say whether under all the *circumstances the effect of the assignment is to defeat or delay creditors. As to this being a [*459

fraudulent preference,—to constitute a fraudulent preference, the transaction must be not only in contemplation of bankruptcy, but it must also be purely voluntary. This was neither. Then, were the goods in the possession, order, and disposition of Tomlin at the time of his bankruptcy with the consent of the true owner? The question of reputed ownership is unaffected by consent. The affirmative must be proved by the assignees: they must show that the goods were in the possession and under the control of the bankrupt as the reputed owner. Now, here, the jury must have thought that that which took place on the Friday preceding the bankruptcy of Tomlin put an end to his apparent ownership. As to the rejection of evidence,—it is always in the discretion of the judge to allow the plaintiff to call a witness in answer to the case set up by the defendant. From the note of my Brother Byles, I should conclude here that the evidence tendered was withdrawn.

KEATING, J.—I am of the same opinion, and for the same reasons.

BYLES, J.—I certainly was under the impression that the evidence tendered was not persisted in. At all events, I see no reason to find fault with the conclusion the jury came to. Rule refused.

*460] *THE ALLIANCE BANK OF LONDON AND LIVERPOOL, LIMITED, v. HOLFORD. *May 7.*

SAME v. SAME.

SAME v. SAME.

HOLFORD v. THE ALLIANCE BANK OF LONDON AND LIVERPOOL, LIMITED.

A. having obtained a verdict against B. & Co., his bankers, for the amount of his cash balance and nominal damages for dishonouring his check, and B. and Co. having brought actions against A. upon bills of exchange to a larger amount which they had discounted for him, the judge stayed the execution in A.'s action until the fifth day of the following term. B. & Co.'s actions in the meantime ripened into judgments. The Court allowed the judgments to be set off against each other (subject to the lien, if any, of A.'s attorney), notwithstanding A. had in the meantime become bankrupt, and thus the interests of third parties had intervened.

MILWARD, on behalf of the Alliance Bank, on a former day in this term obtained a rule calling upon Mr. Holford to show cause why the plaintiffs in the three first-mentioned causes should not be at liberty to set off the amount of the judgment obtained by them in such causes respectively against the judgment obtained against them by Holford in the last-mentioned cause.

The affidavits upon which the application was founded, stated that the first of the above-mentioned causes was brought to recover 2769*l.* 2*s.* 6*d.*, being the amount of principal and interest due to the plaintiffs as the holders of three several bills of exchange which had been discounted by them for the defendant, in which action judgment was signed on the 23d of February, 1864, for 2769*l.* 2*s.* 6*d.* debt, and 12*l.* 16*s.* 4*d.* for costs, making in the whole 2781*l.* 18*s.* 10*d.*: That the second of the above-mentioned causes was brought to recover the

amount of principal and interest moneys due to the plaintiffs as the holders of a bill of exchange drawn by the defendant on and accepted by one W. N. De Mattos for 1026*l.* 5*s.* 9*d.*, and by the defendant endorsed to the plaintiffs, in which judgment was signed on the 17th of March, 1864, for 1030*l.* 18*s.* 4*d.* debt, and 13*l.* 1*s.* 10*d.* for costs, making in the whole 1044*l.* 0*s.* 2*d.*: That the third of the above-mentioned causes was brought to recover the sum of 36*l.* 4*s.* 9*d.* *due to the plaintiffs for money paid by them for the defend- [*461 ant at his request on his check dated the 5th of December, 1863, in which last-mentioned action judgment was signed on the 18th of March, 1864, for 36*l.* 4*s.* 9*d.* debt, and 13*l.* 15*s.* 4*d.* for costs, making in the whole 50*l.* 0*s.* 1*d.*: That, in December, 1863, Holford brought an action against the above-named plaintiffs to recover a balance of 3709*l.* 11*s.* 10*d.*, and damages for the dishonour of his check: That the last-mentioned action came on for trial at the sittings in Middlesex after Hilary Term last before Erle, C. J., when a verdict was found for Holford for 3709*l.* 11*s.* 10*d.*, and 1*s.* damages; and that execution was stayed until the fifth day of the present term: That a meeting of Holford's creditors was held on the 5th of February, 1864, and at such meeting a statement of his affairs was read, showing debts to the extent of 25,187*l.*, to meet which he had assets to the extent of 3206*l.*, leaving a deficiency of 21,981*l.*: And that, on the 16th of March, 1864, a petition for adjudication of bankruptcy was filed against Holford, on which he was adjudicated bankrupt on that day.

E. James, Q. C., T. Jones and C. Russell, now showed cause.—They submitted, that, to allow this set-off would be giving an unfair advantage to the Alliance Bank against the estate of Holford, which but for the stay of execution in Holford's action they could not have had, seeing that, at the time he would in the ordinary course have had his judgment and execution against them, their claims against him would not have matured into judgments so as to be capable of being set off: and they referred to *Maw v. Ulyatt*, 31 Law J., Ch. 33, where, a tenant having obtained judgment and issued execution against his landlord, afterwards became indebted to him for sums of rent and *di- [*462 lapidations, and it was held that the landlord was not entitled by injunction to restrain proceedings upon the judgment on the ground of set-off.

Lush, Q. C., and Milward, in support of the rule, were stopped by the court.

ERLE, C. J.—The substance of this rule is to seek to set off cross-judgments between the same parties against each other. I am of opinion that the applicants are entitled to have the rule made absolute. The complaint on the part of Mr. Holford, or rather on the part of his assignees, is, that by allowing these judgments to be set off one against the others we shall be interfering with the legal rights of third parties. That, however, is the case with every set-off of judgments. Where there are cross-judgments, and the one party is solvent and the other insolvent, it has always been considered to be manifestly unjust to allow execution to go against the former, when his remedy against the other would be unavailing. With regard to the present case, complaint is made of my having stayed the execu-

tion on the verdict of the 13th of February. It is, however, the strict legal right of the judge to stay the execution if he thinks it a fit case for the exercise of the power: and very clear am I that it was a duty I was bound to perform on this occasion; and my learned Brethren are of the same opinion. It is impossible to exaggerate the energetic striving on the part of Mr. Holford and his assignees to get 20s. in the pound from the bank and to pay them 2s. 6d. in the pound. The facts were these:—Holford procured the bank to discount for him certain acceptances of De Mattos, then a merchant in good credit at Liverpool, and to place the proceeds to his account with them. De *463] Mattos becoming embarrassed, and not likely to *meet his engagements, Holford draw a check upon the bank for the balance standing to his credit, 3709*l.* 11*s.* 10*d.*,—in fact the whole proceeds of these bills,—and the bank under the circumstances felt themselves justified in dishonouring his check; and the jury seem to have entertained the same opinion, inasmuch as they gave Holford nominal damages only. The question now is whether or not these judgments should be set off against each other. The whole may be considered as substantially one transaction: and I think we should be grossly mistaking our duty if we did not accede to the application.

WILLES, J.—I am of the same opinion. I apprehend that it is a general rule, that, where two parties have judgments against each other, the court will for the purpose of avoiding uncertainty, vexation, and expense, order them to be set off against each other. There is nothing to show that this case is an exception to the general rule.

BYLES, J.—I am of the same opinion. I think my Lord exercised in this case a strict legal right with strict and impartial justice. Though these are several actions, they all arise out of one and the same transaction. The courts are always astute to promote set-off in aid of justice and honesty. In a case of *Gale v. Luttrell*, 1 Y. & J. 180, where there were cross claims, the Court of Exchequer (in Equity) stayed a decree for years, in order that the defendants, who had filed a cross-bill, might be protected from paying the money until their suit could be brought to a hearing. Lord Chief Baron Alexander there says: “It has been said to be an unusual application to the court to stay the effect of a decree directing the payment of a sum *464] of money until a cross-suit instituted for the purpose of *obtaining a different decree can be brought to a hearing. That, if there were any foundation for it, might be an objection: but I do not agree to the proposition that this court will not interfere for such a purpose. I am not able to distinguish this from the common case of a judgment recovered at law, and the defendant at law comes here and says, I have an equity to be relieved against this judgment, or, I have a set-off in equity against it, and I am desirous to stay the payment of the money until that equity, or that equitable set-off, shall have been decided upon or investigated in this court. Such an application is one of every day’s practice; and the present case seems to me to be within the principle.” And this court in *Masterman v. Malin*, 7 Bingh. 435 (E. C. L. R. vol. 20), 5 M. & P. 325, seemed inclined to adopt the same principle. The order for staying the execution in this case was perfectly right. I think very gross injustice would have been done if that order had not been made. I will say nothing as to De Mattos.

As to Holford, if his estate should wind up badly, it is but right that the set-off should be allowed: if well, nobody will be hurt by it. But it is sufficient to say that justice requires that the set-off should be allowed. The rule will therefore be made absolute, subject to the lien, if any, of Holford's attorney for costs,—to be ascertained, if the parties should differ, by one of the Masters.

KEATING, J.—I am entirely of the same opinion. To refuse to make this rule absolute, would be in effect to make the Alliance Bank pay a large proportion of Holford's debts.

Rule absolute accordingly.

*CURTIS v. PLATT. May 7. [*465

The defendant's costs of "preparing for trial" cannot be allowed where the plaintiff discontinues before notice of trial,—even though liberty had been reserved to the plaintiff under a judge's order to set down the cause for trial before issue joined, and a special jury had been struck.

THIS was an action for the alleged infringement of a patent. By an order of Keating, J., made by consent on the 29th of May, 1862 (the declaration having been delivered on the 19th), the plaintiff was to be at liberty to set down the cause for trial at the sittings after Trinity Term, before issue joined, and without giving any notice of trial,—the defendant undertaking to accept short notice, if necessary. After the special jury had been nominated but not struck, the plaintiff obtained a rule to discontinue,—issue never having been joined, and no notice of trial having been given.

Upon taxation of the costs of discontinuance, the Master refused to allow the defendant any costs of preparing for trial. He was also represented to have disallowed the costs of preparing a notice of objections to the plaintiff's patent.

Mellish, Q. C., in Hilary Term last, moved for a review of the taxation.—As a general rule, no doubt, no costs of preparing for trial are allowed before notice of trial: *Cooper v. Boles*, 5 Hurlst. & N. 188; *Freeman v. Springham*, 14 C. B. N. S. 197 (E. C. L. R. vol. 108). But, it is submitted, this case is taken out of the ordinary rule, by the circumstance of the plaintiff's being allowed to set the cause down for trial before notice and before issue joined. At all events, the defendant should be allowed the costs he was necessarily put to in preparing his notice of objections. [ERLE, C. J.—There is a special provision for those costs in the 15 & 16 Vict. c. 83, s. 43.] But that has been held to apply only where the cause has been brought to trial: *Greaves v. The Eastern Counties Railway Company*, 1 Ellis & E. 961 (E. C. L. R. vol. 102), 28 Law J., Q. B. 290. [*466

A rule nisi having been granted,

Lush, Q. C., now showed cause.—In *Freeman v. Springham*, following the decision of the Court of Exchequer in *Cooper v. Boles*, this court held that a plaintiff is not in any case entitled to the costs of preparing for trial,—such as, instructions for brief, drawing and copying briefs and documents, and advising on evidence,—until after notice of trial; and that even though the defendant has obtained

repeated orders for time to plead, extending down to five or six days before the commission day of the assizes, and is under terms to take short notice of trial, or such notice as the plaintiff can give. There is no difference between that case and this, except that here the cause was to be set down for trial before notice of trial, and though the cause was not at issue,—a condition for the benefit of the plaintiff. There was no stipulation for the term suggested in the judgment of Willes, J., in *Freeman v. Springham*. The first ground of the motion is disposed of by the cases cited. Then, as to the costs of preparing the particulars of objections. The Master has allowed the costs of drawing the particulars, but not those of the inquiries made in order to be prepared to sustain the objections. This is like the expense incurred in looking out for witnesses, in making experiments, or models, or the like.

Mellish, Q. C., in support of his rule.—The question is whether this case does not form an exception to the rule laid down in those referred to,—subject, of course, to the exercise of the Master's discretion as to what costs should be allowed. The plaintiff having liberty reserved *467] to him to set down the cause for trial and *strike a special jury, it is manifestly reasonable that the defendant should be allowed at once to set about preparing his defence. The condition was inserted for the plaintiff's benefit in the defendant's order. The plaintiff having got those terms, the defendant was bound at his peril to be ready. [BYLES, J.—You are in effect asking us to impose a condition upon the judge's order, which the defendant's attorney neglected to ask for at the time.] It is a condition that is, or ought to be, necessarily implied from the circumstances. The ordinary rule cannot apply where notice of trial is dispensed with. [WILLES, J.—Notice of trial was not dispensed with. The defendant is to take short notice.] The next question is, whether part of the costs are not properly referable to the notice of objections,—particulars of the places where and times when the plaintiff's alleged invention had been used. [*Lush*.—They are all charged in the bill as preparations for the trial.]

WILLES, J.—As this is a question affecting the general practice of the court, I regret that the Chief Justice is necessarily absent in the discharge of a public duty.(a) But I am relieved from any great anxiety on that score, because my Lord was a party to the recent decision of this court in *Freeman v. Springham*, 14 C. B. N. S. 197 (E. C. L. R. vol. 108). I take it as a general rule that no principle can be more clear than that a defeated litigant ought to bear the expense which the opposite party has been put to. It is necessary, however, that that rule should be guarded by reasonable limitations for the purpose of preventing the successful party from imposing exaggerated expenses upon his adversary. Consequently, the courts have from time to time been called upon to lay down the limits beyond *468] which these *expenses shall not be allowed, for the purpose of preventing extravagance and extortion, and to discourage suitors from indulging in the luxury of expenses which are not really necessary, but are only incurred with a view to allay the party's anxiety and purely for his own personal security and satisfaction. Take an

(a) His Lordship was in attendance at Her Majesty's levee.

extreme case:—A cause at the assizes involves interests of large amount or questions of great importance. A learned counsel of pre-eminently distinguished talent is taken down “special” by one of the litigants, to whom is given by way of honorarium a much larger sum than would have been paid to one practising on the particular circuit, but which may in one sense be said not to be an unreasonable sum. There are cases which would justify such a course: but the universal practice is to disallow such a fee. It is an expense incurred by the party for his own satisfaction and for his own purposes; and he must bear it himself. So with respect to costs of preparing for trial before notice of trial has been given. The vast majority of actions which are commenced in the superior courts never come to trial at all. Of 10,000 commenced, probably about 250 are set down for trial, of which even some are never tried. This being the undoubted fact, it is obvious, that, if the parties were in the majority of cases allowed to incur the expense of preparing for trial when there is little or no probability of the cause coming to trial, a great deal of useless expense would be incurred, and much injustice and oppression would be perpetrated. In order to avoid that, it became necessary for the courts to lay down some general rule as to the time when it might be considered reasonable that the expense of preparing for trial should be incurred. It would obviously be impossible to fix a period which would suit every case. But the practice which we find laid down, viz. that no *costs of preparing for trial shall in any case be allowed before notice of trial has been given, seems to mete [*469 out the true measure of justice in the great majority of cases. This is the view taken in *Cooper v. Boles*, 5 Hurlst. & N. 188, and in *Freeman v. Springham*: and to that rule I apprehend we are bound to adhere, even though it may in particular cases operate inconvenience, or, it may be, injustice. The known certainty of the law is the safety of all. As to the first ground of the rule, therefore, looking at what has been so recently laid down in this court, I think we are bound to hold that the defendant fails. Liberty to set down the cause for trial before issue joined and notice of trial given, was a boon granted to the plaintiff from which the defendant should gain nothing. The order excludes the inference that notice of trial was dispensed with; for, it stipulates that the defendant shall accept short notice of trial if necessary. None had been given.

As to the second ground of the rule, it is founded upon this argument, that certain of the costs incurred which might have been useful if the cause had gone to trial as costs of preparing for trial, are of such a nature that they may be fairly said to be accessory to the notice of objections. I do not think the defendant can be allowed to have recourse to that. In the first place, I am not satisfied upon the facts before us that these expenses are at all referable to the notice of objections. Take an instance,—inquiring whether any other person has used an invention like the plaintiff’s, and when, where, and under what circumstances. Whether that was necessary for the preparation of the notice of objections or not, must depend upon whether or not the defendant had a knowledge of the fact. It could only have been necessary if the defendant was ignorant of the prior use of similar in-

*470] ventions. I must express at least my strong doubt whether the *expenses attending such inquiries ought to be allowed at all,—whether they do not fall within the category of the surveys and valuations in *May v. Selby*, 4 M. & G. 142 (E. C. L. R. vol. 43), 4 Scott N. R. 727; or of the expenses attending experiments by scientific men, to enable them to give evidence at the trial, as in *Severn v. Olive*, 6 J. B. Moore 285, 3 Brod. & B. 72 (E. C. L. R. vol. 7); or the construction of models, or sending scientific witnesses to a distant part of the country for the purpose of inspecting a building, as in *Bayley v. Beaumont*, 11 J. B. Moore 497. If I were bound to form an opinion in this case as to whether or not the expenses of inquiries of this description ought to be allowed, I should incline to the negative. Entertaining that notion, I should be loth to send this matter back to the Master upon the chance of his finding that some of these items may be referable to the notice of objections. Upon the whole, I am of opinion that the rule should be discharged.

BYLES, J.—I am of the same opinion. The order of my Brother Keating is a very usual one where there is an arrear of causes in the court. The defendant comes to ask for time to plead. It is every day's practice to impose terms in order to prevent undue delay. If the defendant had wished to go on preparing for trial, he should have asked for the insertion in the order of a stipulation similar to that suggested in *Freeman v. Springham*. As to the second ground of the rule,—it is plain that the defendant himself at first treated these as expenses incident to preparation for trial. Failing to get them in that way, he now wishes to turn round and say they are expenses of preparing his notice of objections. I think he cannot be permitted to do that.

*471] KEATING, J.—I am of the same opinion. The *application of the general rule may be hard in certain isolated cases: but still I think it highly important that it should be adhered to. If the defendant here had asked to have the order qualified in the way suggested, the application would in all probability have been yielded to. As to the other point, I think these clearly were expenses of preparing for trial, and that as such they ought not to be allowed.

Rule absolute, with costs.

RUGG v. WEIR. May 9.

Goods were sold upon the following terms,—“2½ per cent., or three months' bill,”—which was explained to mean cash at the expiration of the month succeeding the current month, deducting a discount of 2½ per cent., or, at the buyer's option, a bill at three months from the same period. The buyer having refused to accept a bill at the end of the second month,—Held, that the seller might at once sue him for goods sold and delivered (*concessit solvere* in the Mayor's Court, London), and was not bound to wait the additional three months.

THIS was an action for goods sold and delivered. Plea, never indebted. The cause was tried in the Mayor's Court, London. The facts were as follows:—

The defendant on the 14th of October, 1863, bought goods of the plaintiff, upon the terms, “2½ per cent. cash, or three months' bill;”

which was explained to mean, that, if the buyer elected to pay cash at the expiration of the current month and the following month, he was to be allowed $2\frac{1}{2}$ per cent. discount, otherwise he was to give a bill at three months. Evidence was given of two former dealings between the parties, upon one of which occasions the defendant paid during the second month, and on the other twenty days after the expiration of the second month, when the plaintiff allowed the discount under protest. The cash not having been paid, the plaintiff drew upon the defendant for the amount at three months from the 1st of [*472] January, 1864. The defendant refused to accept the bill; but, on the 12th of January, 1864, he offered a check for the amount less $2\frac{1}{2}$ per cent. discount, which the plaintiff refused to take; and thereupon this action was brought.

On the part of the defendant it was submitted that the plaintiff could not maintain goods sold and delivered until the expiration of the full term of credit: and accordingly the plaintiff was nonsuited, upon the authority of *Mussen v. Price*, 4 East 147, where it was held, that, where goods were sold upon a contract that the vendee was to pay for them *in three months by a bill of two months*, the contract was for a credit of *five months*, and therefore that assumpsit for goods sold and delivered could not be brought at the end of *three months*, upon the neglect of the vendee to give his bill at two months,—the remedy being by a special action on the case for damages for the breach of contract in not giving such bill.

H. James, on a former day, in pursuance of leave reserved to him, obtained a rule to set aside the nonsuit, and enter a verdict for the plaintiff for 13*l.* 15*s.* 9*d.*, on the ground that the plaintiff was entitled to be paid in money before action brought, in consequence of the defendant refusing to give a bill for the amount due.

Oppenheim now showed cause.—This action is prematurely brought. The terms of sale were,—cash at the expiration of the month succeeding the current month, less $2\frac{1}{2}$ per cent. discount, or a bill at three months from the same period. *Mussen v. Price*, 4 East 147, upon the authority of which the plaintiff was nonsuited, was confirmed by *Lee v. Riden*, 7 Taunt. 188 (E. C. L. R. vol. 2), 2 Marsh. 495 (E. C. L. R. vol. 4), and *Helps v. Winterbottom*, 2 Ad. * & E. 431 [*473] (E. C. L. R. vol. 29). In the last-mentioned case goods were sold at six months' credit, payment to be then made by a bill at two or three months, at the purchaser's option: and the court held that this was in effect a nine months' credit, and consequently that an action for goods sold and delivered commenced within six years from the end of the nine months was in time to save the statute of limitations. "Supposing," said Lord Tenterden, "the agreement to have been for six months' credit, and payment at the end of that time by a bill at two (or three) months, I think the action was properly brought. It is commenced in time, whether the term of credit be considered in the whole as eight or nine months: and it appears to me that no action could have been maintained for goods sold and delivered till the eight or the nine months had expired. The plaintiff might have brought an action at the end of the six months, for not giving a bill pursuant to the contract: but then he would not have recovered the whole price of the goods: he would only have been entitled to such damages

as the jury might have thought reasonable for the breach of contract." So, here, possibly the plaintiff might have maintained an action at the expiration of the second month, for not giving the bill. [ERLE, C. J.—In *Helps v. Winterbottom*, the defendant was not asked for a bill: therefore the credit was an eight or nine months' credit. Here, the defendant refused to give his acceptance: he therefore became liable to be called upon to pay cash,—whether with or without discount is another matter.] In *Dutton v. Solomonson*, 3 Bos. & P. 582, it was held, that, if goods be bought, to be paid for by a bill at two months, and the vendee refuses to accept, he cannot be sued in an action for goods sold and delivered until after the expiration of the two months. So, in *Price v. Nixon*, 5 Taunt. 338 (E. C. L. R. vol. 1), it was held, *474] that, upon a sale of goods at *six or nine months' credit, the purchaser, by not paying at the end of six months, makes his election to take credit for the nine months, and there is no debt to support a commission of bankruptcy till the nine months are expired. In *Ferguson v. Carrington*, 9 B. & C. 59 (E. C. L. R. vol. 17), A. purchased goods upon credit, fraudulently intending at the time of the contract not to pay for them. B., the vendor, brought assumpsit as for goods sold before the time of credit expired: and it was held that the action was not maintainable,—Park, J., saying: "As long as the contract existed, the plaintiffs were bound to sue on that contract. They might have treated that contract as void on the ground of fraud, and brought trover. By bringing this action, they affirm the contract made between them and the defendant." Again, in *Strutt v. Smith*, 1 C. M. & R. 312, goods were sold upon the following terms,—“7½ per cent. discount, bill at three months; 10 per cent. discount, cash in fourteen days;” and it was held that the vendors could not sue in *indebitatus assumpsit* for goods sold and delivered within the fourteen days, even if the sale had been effected by fraud on the part of the vendee, so that trover might have been maintained for the goods.” There, Parke, B., says: “It is clear that the plaintiffs cannot avail themselves of the defendant's fraud so as to rescind the contract, and substitute a new contract of sale on different terms. They might possibly on the evidence have maintained trover, on the ground that the fraud vitiated the contract: but, if they treat the transaction as a contract at all, they must take the contract altogether, and be bound by the specified terms.” That is a totally different cause of action. *Paul v. Dod*, 2 C. B. 800 (E. C. L. R. vol. 52), is a distinct authority for the defendant. A. sold goods to B., to be paid for partly in cash, and the residue by bills at intervals of three months each. It was *475] held that the payment of the *money and the delivery of the bills did not constitute a *condition*, so as to entitle A. upon non-payment of the money and non-delivery of the bills, to sue as for goods sold and delivered, without waiting the expiration of the credit: nor could such action be maintained for the amount of the stipulated cash payment,—A.'s remedy being by special action upon the express contract.

H. James was not called upon.

ERLE, C. J.—I am of opinion that this rule should be made absolute. The action is brought to recover the price of goods sold and delivered. The goods were sold on the 14th of October, upon a credit

for the current month and the entire succeeding month, and then a bill at three months, or cash less $2\frac{1}{2}$ per cent. discount. It is clear that the plaintiff might have maintained an action against the defendant for refusing to give a bill at the stipulated time. There are other facts in the case which appear to me sufficient to entitle the plaintiff to a verdict: but, if the matter had rested upon the contract as stated by Mr. Oppenheim, I should have held the plaintiff to be entitled to recover. The goods were sold on a credit till the end of November; and the further credit of three months was at the option of the defendant: he was to have three months more if he elected to give a bill, instead of paying cash and taking a discount of $2\frac{1}{2}$ per cent. If he elected not to give a bill, the money became due immediately. That is reconcilable with all the cases; and they all confirm this view. If the contract be for a credit of three months, goods sold and delivered will not lie until the period of credit be expired, as in *Dutton v. Solomonson*, 8 Bos. & P. 582, and *Helps v. Winterbottom*, 2 B. & Ad. 431 (E. C. L. R. vol. 29). In the latter case, the vendee was never called upon to accept a bill, *consequently the credit enured until the extended period. [*476 *Mussen v. Price*, 4 East 147, falls within the same principle. *Paul v. Dod*, 2 C. B. 800 (E. C. L. R. vol. 52), is also reconcilable, because there the goods were sold upon one entire contract, to be paid for, 30*l.* in cash, and the residue by instalments of 30*l.* at each succeeding three months, to be secured by bills. No portion of the goods could be singled out for payment in cash: there was no debt of 30*l.* for goods sold, so as to entitle the plaintiff to maintain a separate action. In *Nickson v. Jepson*, 2 Stark. N. P. C. 227 (E. C. L. R. vol. 3), the goods were sold at three months' credit, the vendor agreeing, if the vendee should want further time, to take his bill at three months' date at the end of the first three months; it was held, that, unless the vendee gave such a bill at the end of the first three months, the vendor might bring his action immediately. Lord Ellenborough said: "The plaintiff had agreed, if the defendant wished it, to give further time: but the defendant was to give to the plaintiff his bill at three months as the price of that indulgence. It was incumbent upon him to give such a bill, if he wished to avail himself of the indulgence offered to him."

WILLES, J.—I am of the same opinion. Looking at the former transactions between these parties, I think the case was a proper one to leave to the jury. Looking at those transactions, and at the offer of the check here less the discount, I think the jury might well have been justified in concluding that the bill formed no part of the bargain, but was merely incidental. I also agree with my Lord, that, if we are to take the terms as stated in the invoice, the case is distinguishable from all those relied on by Mr. Oppenheim, and we may very well hold the *concessit solvere* to be satisfied by the proof given. The terms are,—" $2\frac{1}{2}$ per cent. cash, or three months' bill," which is *very different from "credit three months, and bill six [*477 months." Those words indicate a fixed mode of payment, involving a credit for the whole period, whether a bill is given or not. Here, what the agreement amounts to, is, that, if the buyer wishes credit beyond the current month and the month following, he must give a bill at three months. If he does not give a bill, he is to pay

cash and to be allowed 2½ per cent. discount. In that state of things, where the purchaser refuses to accept the bill, is the seller bound to sue him in a special action for not accepting, or may he sue for the price of the goods? I apprehend that depends upon whether or not the election is made, and whether when made it is revocable. It was made here: and such election, when made, I apprehend is irrevocable. As soon as the purchaser declared that he would not give the bill, the seller had a right to discharge his mind altogether of the alternative. To hold otherwise would be changing the position of the seller. The election once made, it is irrevocably made, where it cannot be revoked without damage to another person. The buyer having refused to give the bill, his liability from that moment was to pay in cash. Where a liability to pay money exists, you are not bound to set forth all the series of events which result in a liability on the one side to pay money, and a right on the other to receive it. Certainly the expression "concessit solvere" is at least as wide as "assumpsit." I desire further to add that this is a case which under the first great (modern) statute of amendments,—Baron Parke's Act (3 & 4 W. 4, c. 42, s. 23), an amendment of the declaration might properly have been made; much more under the larger powers conferred upon the judges and the court by 15 & 16 Vict. c. 76, s. 222, and 17 & 18 Vict. c. 125, s. 96.

*478] BYLES, J.—I entirely agree with the rest of the *court that this rule should be made absolute. The justice of the case is apparent: and I am glad to find that we are able to administer justice here without violating the strict rules of law. Until the case of *Brooke v. White*, 1 N. R. 330, it was doubted whether an action for goods sold and delivered would lie in such a case as this, even at the expiration of the time the bill would have to run. Several cases were there cited to that effect. The ground upon which it is now held to lie is thus put by Park, J., in *Helps v. Winterbottom*, 2 B. & Ad. 435 (E. C. L. R. vol. 22),—"The ground upon which it has been held that *indebitatus assumpsit* lies at the expiration of a credit of the present description has been, that the contract substantially is for so many months' credit, payment to be made at the end of that time in cash, but security to be given for part of the time by the delivery of a bill at a certain stipulated period." Without in the least impugning the way Park, J., puts the case, I think this action will lie. It has been urged that no action of this description could be commenced until the expiration of the three months stipulated for the currency of the bill, and that that should have been left to the jury. I am further of opinion that there has been an election here under circumstances which render it irrevocable. But the ground suggested by my Brother Willes is alone sufficient to dispose of this case. The meaning of *concessit solvere* may be doubtful. But there can be no doubt that this was a fit case for amendment, if any were necessary.

KEATING, J.—I am of the same opinion. Looking at the previous transactions between these parties, I think there was abundant evidence that the goods were to be paid for in cash less 2½ per cent. discount at the expiration of the month succeeding the current month, unless a three months' bill was given.

Rule absolute.

***TROTMAN v. WOOD and Others. April 27. [*479**

1. One who makes a patent article under a license from the inventor, cannot, in an action against him for royalties, set up any objection to the novelty or utility of the invention or the validity of the specification: but, if the claim in the specification is susceptible of two constructions, one of which would make the specification bad and the other and more natural one would make it good, it is competent to him to insist that the latter is the true construction.

2. Three descriptions of anchors were well known—1. the Dutch or common anchor, in which the arms and the shank were all in one piece, the palm or fluke being sometimes placed *inside* and sometimes *outside* the extremity of the arm,—2. Rogers's anchor, the peculiarity of which was that the palm or fluke was placed *outside* the extremity of the arm,—3. Porter's anchor, the arms of which moved on an axis in the shank, the palm being placed *inside* the arm, with a horn or toggle at the back and *of the width of the arm*.

The plaintiff took out a patent for "Improvements in anchors," such improvements mainly consisting in placing the palm at the *back* or *outside* or "intermediately of the breadth" of the arm, and making the horn or toggle form part of and of the same width as the palm,—combined with Porter's movable arms.

In his specification he thus described his invention,—“The improvements are chiefly applicable to that class of anchors known as ‘Porter's anchors,’ and consist,—first, of forming or fixing the palm intermediately of the breadth of the arm,—secondly, in forming the horn wider than the arm,—and thirdly, in forming or affixing the palm of that class of anchor known as Porter's anchor at the back of the arm.” And, after describing the drawings, he concluded thus:—“I would remark that I am aware that it is not new to place the palm at the back of the arm of ordinary anchors: this part of the invention, therefore, consists of *combining the fixing of the palms to the back of those arms of anchors which move on axes*. The angles which the faces of the arms and the faces of the palms make to the shank and to each other may be varied: but it is important that the angles which the palms make to the shank and those made by the arms should be different. The construction shown are those I employ.”

The defendants (having a license from the plaintiff) made anchors with the arms moving on an axis like Porter's, and with the palm at the *outside* of the arm, with a horn of a greater width than the arm, and nearly identical with that described in the plaintiff's specification and drawings; but they forged the arms, palm, and horn *all in one piece*, whereas the plaintiff's palm and horn were formed together and then fixed to the back or “intermediate of the breadth” of the arm.

The jury, in an action against the defendants for non-payment of royalties and for an account, found, as regarded the *palm*, that the defendants had adopted the plaintiff's invention, but, not being able to agree as to the horn, they were discharged from any finding as to that:—Held, that the plaintiff was entitled to an account of the anchors so made.

THIS was an action for royalties due under a license to use a patent invention.

The declaration stated, that, by deed dated the 20th of December, 1861, made between the plaintiff of the one part and the defendants of the other part,—after reciting that the plaintiff was the true and first inventor of a certain invention intituled “Improvements in anchors,” and that the said invention was at the time of the grant of the thereafter-mentioned letters-patent new as to the public use and exercise thereof within the realm, and of great public utility, and that *Her Majesty by her letters-patent under the great seal of Great Britain, bearing date at Westminster the 20th of April, 1852, for herself, her heirs and successors, granted the plaintiff, his executors, &c., especial license, &c., that he the plaintiff, his executors, &c., by himself and themselves, or by his and their deputy or deputies, servants, or agents, or such others as he, the plaintiff, his executors, &c., should at any time agree with, and no others, from time to time and at all times thereafter during the term of years therein expressed, should and lawfully might make, use, exercise, and vend the said invention within England, Wales, and the town of Berwick-upon-Tweed, for the term of fourteen years from the date of the said letters-patent; [*480

and that a sufficient specification of the said invention under the hand and seal of the plaintiff was duly enrolled in Her Majesty's High Court of Chancery; and that the plaintiff had agreed with the defendants to grant to them a license to use the said invention for which the said letters-patent were granted to the plaintiff, for such term, and subject to such conditions as were thereafter contained,—it was by the said indenture witnessed, that, in pursuance of the said agreement, and in consideration of the payments thereafter reserved, and the covenants, provisoes, and agreements thereafter contained and on the part of the defendants, their executors, &c., to be paid, performed, and kept, he the plaintiff did give and grant unto the defendants full and free license, power, and authority to use, exercise, and put in practice at the present manufactories of the defendants situate at Saltney, near Chester, in the counties of Flint and Chester, and at Stourbridge, Cradley, Wolverhampton, Liverpool, and London, or at such other place or places, as they the defendants should at any time thereafter (first giving notice thereof to the plaintiff, his executors *or administrators,) think proper, the said invention for

*481] which the said letters-patent were so granted as aforesaid, or any part or parts thereof, and to vend, sell, and dispose of the anchors and other articles manufactured according to the said invention, or any part thereof, when, where, upon such terms, and at such price as the defendants should think fit. To have and to hold the said license, power, privilege, and authority thereby given and granted for and during the residue then unexpired of the said term of fourteen years from the 20th of April, 1852, subject, nevertheless, to the covenants, restrictions, conditions, and agreements thereafter contained on the part of the defendants to be observed and performed in respect of the said license and privilege thereby granted. Yielding and paying to the plaintiff for the said license thereinbefore granted to use the said invention for which the said letters-patent were so granted as aforesaid such sum or sums of money as should be equal to the sum of 10*l.* for every 100*l.* on the selling price at the manufactories of the defendants whereat the same should be made or sold, of all anchors made or to be made by or by means of or according to the said invention the subject of the said letters-patent, or any part or parts thereof, and such sums to be paid by quarterly payments on, &c., in every year: And, in consideration of the license and privilege thereby granted by the plaintiff as aforesaid, they the defendants did by the said deed of covenant promise and agree to and with the plaintiff in manner following, that is to say, that they the defendants should and would during the continuance of the license thereby granted render or cause to be rendered unto the plaintiff, within one calendar month next after each of the said last-mentioned days, a true and just account or

*482] particular in writing (to be verified, if required, by *solemn declaration under or according to the provisions of the statute 5 & 6 W. 4, c. 62, for the suppression of voluntary oaths and affidavits,) of the number of anchors made and the value of each anchor made and sold in the preceding quarter of a year up to the said last-mentioned quarterly days respectively, by them the defendants, at their said or any other manufactories, under or by means of or according to the said invention, or any part thereof, and also specifying the

price for which the same were sold and the date of such sale: Provided always that all anchors made and sold as aforesaid should for the purposes of those presents be considered as sold on the day of the delivery or removal of the same from the manufactory of the said defendants; and further that they the defendants should and would within one calendar month next after the rendering of every such account pay or cause to be paid to the plaintiff, his executors, &c. (which payment was to be considered as a fulfilment of the now stating covenant and in pursuance of the reservation thereinbefore contained), the sum or sums of money thereby appearing to be due in respect of the moneys thereinbefore reserved and made payable as aforesaid, and in the like proportion; and should and would from time to time when thereto required by the plaintiff, his executors, &c., produce and show to the plaintiff, his executors, &c., or to such other person as the plaintiff, his executors, &c., should from time to time appoint by writing in that behalf, at the said manufactories, or other the manufactories for the time being of the defendants, all books, accounts, and writings relating to the anchors so made at their manufactories, for the purpose of enabling the plaintiff, his executors, &c., to examine and check every account and particular so to be made as aforesaid; and further that they the defendants should and would give and *procure for the plaintiff, and to and for any person [*483 or persons to be in writing authorized by him for that purpose, free access and liberty to enter into and upon the said manufactories and premises, or other the manufactories for the time being of the defendants, at all reasonable times and hours when and as he or they should think proper during the continuance of the said license thereby granted, to view and inspect the method there used and employed in manufacturing anchors, and the quantity or quantities and value or values thereof; and also that they the defendants should and would mark or stamp, or cause to be marked or stamped, all the anchors made by them under or by virtue of the license thereby granted, and by means of the said invention, with the words "Henry Wood & Co. Trotman's Patent;" and also should cause each anchor to be marked or stamped consecutively in the order in which they were made, beginning with the number 1. Averment, that the defendants did, after the making of the said deed, and during the said term of fourteen years, make and manufacture divers and very many anchors by and by means of the said invention, or of part or parts thereof respectively, and under and by virtue of the said deed and the license and authority thereby granted: that thereupon and thereby a large sum of money, amounting, to wit, to 1000*l.* for and in respect of the said rent or patent dues of 10*l.* for every 100*l.* on the selling price of the said anchors made and manufactured by the defendants as aforesaid, became and was due and payable from the defendants to the plaintiff according to and under and by virtue of the said deed and the said license and authority: Breach, that, although the time for the payment of the same by the defendants had elapsed, and the plaintiff had done all things and all things had happened and existed to *entitle the plaintiff [*484 to payment thereof, yet the defendants had not paid the same, or any part thereof, and the same remained unpaid: That the defendants did after the making of the said deed, and during the continu-

ance of the said license and term, manufacture at their said manufactories divers and very many anchors by or by means of the aforesaid invention under and by virtue of the said license, and although the plaintiff had done and performed all things, and all things had happened and existed to entitle the plaintiff to have rendered unto him by the defendants a just and true account or particular in writing, according to the defendants' said covenant in that behalf, of the number of the said anchors made, and of the value of each anchor made and sold, and although the time for so rendering such account according to the said deed had elapsed, yet the defendants did not nor would render unto the plaintiff within one calendar month next after the said days respectively, commencing from the date of the said deed, or at any time or times, a just and true or other account or particular in writing of the number of the said anchors so made, or of the value of each anchor made and sold by the defendants as aforesaid in the preceding quarter or portion of a year, but wholly made default in that behalf, contrary to the said deed: And that the defendants did after the making of the said deed, and during the continuance of the said license and term, manufacture at their said manufactories divers and very many anchors by or by means of the aforesaid invention, or part or parts thereof, under and by virtue of the said license, and although the plaintiff had done and performed all things, and all things had happened and existed to entitle the plaintiff to have the said anchors marked or stamped with the words *485] "Henry Wood & Co. Trotman's Patent," *and also to have the said anchors marked or stamped consecutively in the order in which they were made, yet the defendants did not nor would cause the said anchors to be marked or stamped or numbered as aforesaid: Claim, 1000l.

Plea to the first breach,—that the defendants had, agreeably to the terms of the said deed, paid to the plaintiff all moneys due and payable from them to the plaintiff for and in respect of anchors made and manufactured by them by or by means of or according to the said invention, or any part or parts thereof respectively, and under and by virtue of the said deed and the license and authority thereby granted.

Plea to the second breach,—that the defendants did not make default in rendering to the plaintiff such just and true accounts or particulars in writing as in the declaration alleged, or any of them.

Plea to the third breach,—that the defendants did agreeably to the said deed cause to be stamped, marked, and numbered as aforesaid all anchors manufactured or made by them under or by virtue of the license granted by the said deed, and by means of the said invention. Issue thereon.

The cause was tried before Erle, C. J., at the sittings in Middlesex after the last term. The specification, which was put in, was as follows:—

"To all to whom these presents shall come, I, John Trotman, of Dursley, Gloucestershire, send greeting:

"Whereas, her present most excellent Majesty, Queen Victoria, by her royal letters-patent under the great seal of the United Kingdom of Great Britain and Ireland, bearing date at Westminster, the 20th

of April, 1852, in the fifteenth year of Her reign, did, for herself, her heirs and successors, give and grant unto me the said John Trotman, my executors, administrators, and assigns, her especial license, full power, *sole privilege and authority, that I the said John Trotman, my executors, administrators, or assigns, or such others as I the said John Trotman, my executors, administrators, or assigns, should at any time agree with, and no others, from time to time and at all times during the term of years therein expressed, should and lawfully might make, use, exercise, and vend within England, Wales, and the town of Berwick-upon-Tweed, my invention of 'Improvements in Anchors;' in which said letters-patent is contained a proviso that I the said John Trotman shall cause a particular description of the nature of my said invention, and in what manner the same is to be performed, by an instrument in writing under my hand and seal, to be enrolled in Her Majesty's High Court of Chaucery within six calendar months next and immediately after the date of the said in part recited letters-patent, as in and by the same, reference being thereunto had, will more fully and at large appear: [*486]

"Now know ye, that, in compliance with the said proviso, I the said John Trotman do hereby declare that the nature of my said invention, and the manner in which the same is to be performed, are fully described and ascertained in and by the following statement thereof, reference being had to the drawing hereunto annexed, and to the figures and letters marked thereon, that is to say,—

"The improvements are chiefly applicable to that class of anchors known as 'Porter's anchors,' and consist,—first, of forming or fixing the palm intermediately of the breadth of the arm,—secondly, in forming the horn wider than the arm,—and, thirdly, in forming or affixing the palm of that class of anchor known as 'Porter's anchor' at the back of the arm:

"Figure 1 shows part of an anchor, made according to the original mode pursued by Mr. Porter and others *who have made such anchors. In this case the horn α is only of the width of the arm at that part: [*487]

"Figure 2 shows an anchor made according to the first and second parts of my invention: α is the horn, which will be seen to be part of the palm, and to be wider than the arm b ; and this is important in the construction of Porter's as well as other anchors: and it will be further seen that the palms, instead of being formed or welded in front of the arms, are formed or fixed intermediate of the breadth of the arms in making Porter's or other anchors, by which means the holding powers are improved, and the angle at which the palms are formed or fixed may differ from that of the arms:

"Figure 3 is a separate view of the shank and stock of the anchor:

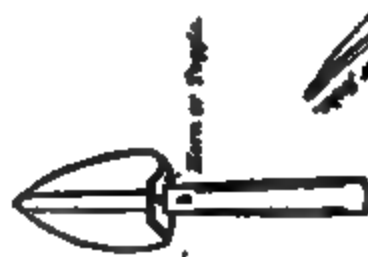
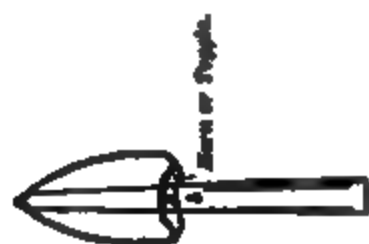
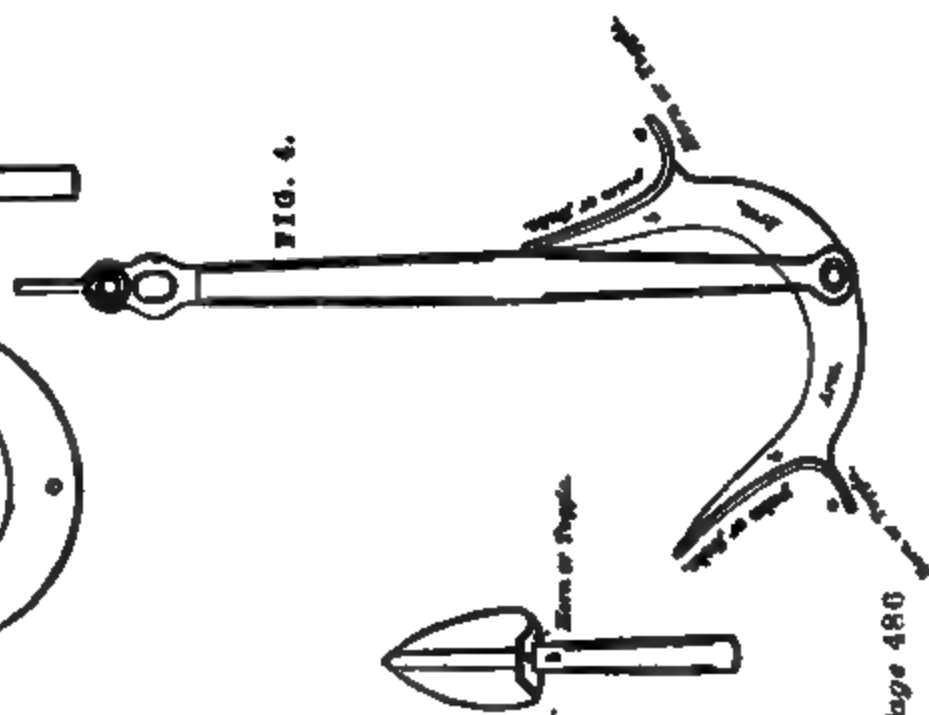
"Figure 4 shows another form of anchor, and wherein the palms are fixed at the backs of the arms, and the horns form part of the palms:

"I would remark that I am aware that it is not new to place the palm at the back of the arm of ordinary anchors: this part of the invention, therefore, consists of combining the fixing of the palms to the back of those arms of anchors which move on axes. The angles

FIG. 1.

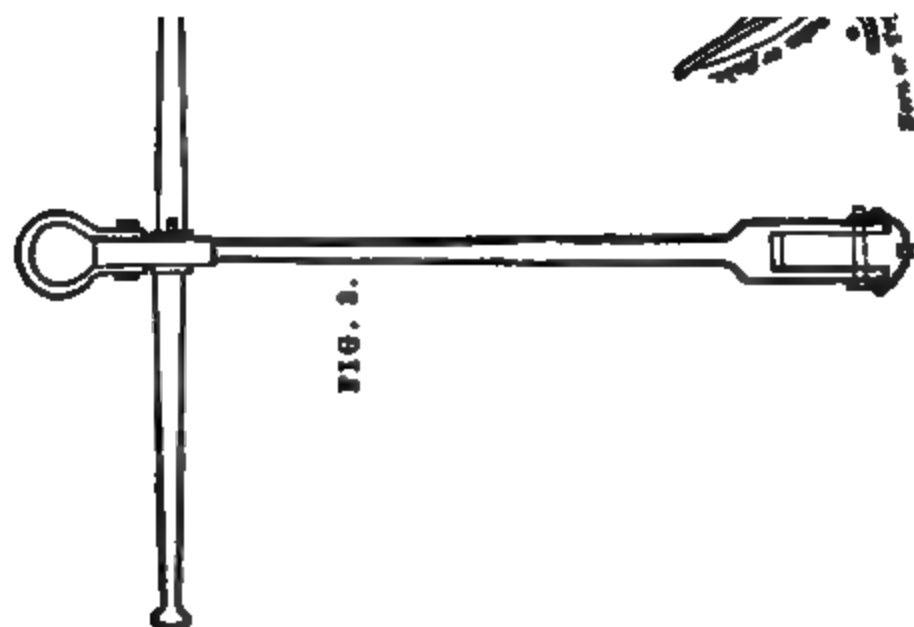


FIG. 4.



To face Page 486

FIG. 3.



which the faces of the arms and the faces of the palms make to the shank and to each other may be varied; but it is important that the angles which the palms make to the shank and those made by the arms should be different. The construction shown are those I employ."

A great number of witnesses were called (the plaintiff himself, amongst others,) to prove the value of the plaintiff's improvements and their utility; for, though the novelty and utility of the invention and the sufficiency of the specification could not be directly put in issue as between these parties, it was necessary to *show what [*488 was the plaintiff's real invention, in order to ascertain whether or not the anchors in respect of which the plaintiff claimed an account and payment of royalties were made under his patent in the whole or in part. The substance of the evidence was as follows:—

In 1838, one Porter obtained a patent for an improved anchor; his improvement consisting in attaching the arms to the shank by means of a bolt which formed an axis on which the arms moved, with a fluke or "palm" *inside* the extremity of each arm, and a horn or toggle at the back and *of the same width as the arm*.

In 1846, one Lieutenant Rogers obtained a patent for improvements in anchors. His improvement upon the Dutch or common anchor (in which the shank, the arms, and the flukes were all forged in one piece.) consisted merely in placing a "palm" or fluke *outside* the extremity of the arm. This was not found very effective. The leading principle was, to have an anchor which would enter the ground *quickly*. That object was in part accomplished, but at the expense of holding power. Lieutenant Rogers obtained a second patent in 1853 for an anchor which was a slight improvement upon his former one.

In 1852, the plaintiff's patent was obtained, being for an improvement in Porter's anchor,—combining Porter's movable arms with a palm placed *outside* or in the *centre* of the arm, so as to form such an angle with the shank when in the ground as to give the greatest possible amount of holding power, and a horn or toggle at the back, *of the same width as the palm*.

The principal points of claim in Trotman's patent were,—first, forming the palm "intermediate of the breadth of the arm," in order that the arm might be set at such an angle to the shank as to give the arm *the greatest *penetrating* power, and to set the palm at [*489 such different angle that it might have the greatest amount of *holding* power when in the ground,—secondly, forming the horn or toggle wider than the arm (the width of the widest part of the palm), in order to obviate one of the principal objections to Porter's anchor, viz., that with the narrow horn the tripping of the anchor was uncertain, and so the palm failed to enter the ground, whereas the wider horn rendered it certain,—thirdly, forming or affixing the palm of that class of anchor known as Porter's anchor (with the arms moving on an axis) at the *back* of the arm, in which case also, as in the first improvement where the palm is placed intermediate on the arm, the angles of palm and shank and arm and shank might be varied so as to insure the best penetrating power to the arm and the best holding power to the palm when once in the ground.

The defendants made anchors with the arms moving on an axis like Porter's, and with the palm at the *outside* or back of the arm, with a horn of a greater width than the arm, and nearly identical in form with that described in the plaintiff's specification and drawings; but he forged the arms, palm, and horn *all in one piece*, whereas it was said the plaintiff's palm and horn were "placed or affixed" on or intermediately of the breadth of the arm by a separate operation: and the so placing the palm outside the arm by the defendants formed the difference of angle which the face of the arm and that of the palm made to the shank of the anchor, and to each other, as claimed by the plaintiff.

The learned judge, in his summing-up, after pointing out to the jury the claims made by the plaintiff in his specification, and the nature of the alleged infringements, in substance told them, that, if *490] the *defendants adopted the plaintiff's plan in the form and position of the palms and the horns, with the palm at a different angle with reference to the shank than the arm, the circumstance of the whole,—arm, palm, and horn,—being formed or welded in one piece would not prevent its being a manufacture in accordance with the plaintiff's patent; and he left it to them to say whether, upon the evidence before them, they were satisfied that the anchors made by the defendants were made in accordance with the claims in the plaintiff's specification with regard to the placing the palm at the back of the arm, and making the horn wider than the arm, *and the differential angle*.

The jury found that the defendants' mode of placing the palm was the same as that described in the plaintiff's specification: but, as to the horn, they could not agree. They were therefore discharged from any finding as to that,—leave being reserved to the plaintiff to move for a new trial upon that point, should it in the result become necessary.

A verdict was thereupon taken for the plaintiff for 180*l.*, to be augmented or reduced according to an account between the parties.

Bovill, Q. C., in Easter Term last, moved, pursuant to leave, to enter a verdict for the defendants, or for a new trial on the ground of misdirection and that the verdict was against the weight of evidence. After referring to the several progressive improvements in anchors from the old Dutch anchor to Porter's and Rogers's anchors, and to the plaintiff's specification, he submitted that the anchors made by the defendants were not made in accordance with the plaintiff's specification, according to its true legal construction and effect. The only novelty in the plaintiff's anchor is, the combination of the arms moving on an axis, *491] with *the palm outside or "intermediate of the breadth of" the arm, and the horn or toggle wider than the arm. The plaintiff could not legally have had a patent for merely doing that to an anchor whose arms moved on an axis which had formerly been done to an anchor with fixed arms: *Brunton v. Hawkes*, 4 B. & Ald. 452 (E. C. L. R. vol. 6). In that case, a patent was attempted to be supported for a peculiar mode of constructing ships' anchors, when a similar plan had been used for adze-anchors and mushroom-anchors; and the court held that the patent could not be sustained. The fish-joint case

(*Harwood v. The Great Northern Railway Company*, 2 Best & Smith 194) (E. C. L. R. vol. 110), and the gas-holder case (*Horton v. Mabon*, 12 C. B. N. S. 437 (E. C. L. R. vol. 104), in error, 16 C. B. N. S. 141 (E. C. L. R. vol. 111)), were decided upon the same principle. Although the defendants (being licensees) cannot object to the sufficiency of the plaintiff's specification, it is perfectly competent to them to ask the court so to read it as to make it good, and to reject a construction which will make it bad. The specification admits that it is not new to place the palm at the back or outside of the arm of ordinary anchors: and this part of his invention the plaintiff says consists of "combining the fixing of the palms to the back of those arms of anchors which move on axes." In his summing-up, the Chief Justice treated the difference of angle of the palm and the arm with reference to the shank as a material matter. That, however, is not claimed by the specification: it is merely stated to be a thing which may be found convenient. The claim is specifically confined to three things,—“1. forming or fixing the palm intermediately of the breadth of the arm,—2. in forming the horn wider than the arm,—3. forming or affixing the palm of that class of anchor known as Porter's anchor at the back of the arm.” The difference of angle is nowhere claimed as part of the *invention. In the old Dutch anchor, the angle would be varied as the palm or fluke was placed inside or outside the [*492 arm. So as to Rogers's anchor.

Grove, Q. C., having applied on behalf of the plaintiff for leave to move pursuant to the reservation made for him at the trial, in the event of the result of the defendants' rule rendering it necessary, the rule was drawn up as follows:—

To show cause “why the verdict found for the plaintiff should not be set aside, and instead thereof a verdict be entered for the defendants, or why a new trial should not be had between the parties, pursuant to the special reservation at the trial, on the grounds that, upon the true construction of the plaintiff's specification, the anchors made by the defendants were not according to or within the plaintiff's patent; that the specification does not claim every description of palm with the flat surface on the outside; that it does not claim the difference of the angle, as relied upon by the plaintiff and as left to the jury; and that the specification must be construed to claim only the particular description of palms therein described, or such palms as are shown fixed at the back of the arms, and where the horns form part of the palms; and on the ground that the judge misdirected the jury or that the verdict was against the evidence in these respects: And, on hearing counsel on behalf of the plaintiff, it is further ordered, that, in the event of this rule being made absolute, the plaintiff shall be at liberty to move this court as he may be advised.”

Grove, Q. C., and *Webster*, now showed cause.—The non-finding of the jury having for the present disposed of the question as to the horn or toggle, all that remains now to be considered, is, whether the *defendants have availed themselves of the plaintiff's inven- [*493 tion as to the palms. The plaintiff's claim is for the form of the arm and its position with respect to anchors having the arms moving on axes; not for the mode of making it. The only question is, whether what has been done by the defendants would amount to

an infringement of the plaintiff's patent if this were an action for an infringement, or falls so near it as to be a question for the jury: and the jury have found that it was an infringement. Taking a new and essential part of an invention is an infringement: *Lister v. Leather*, 8 Ellis & B. 1004 (E. C. L. R. vol. 92), and other cases. In the old Dutch anchor, the palm was placed indifferently in front or at the back of the arm. In Rogers's anchor, the palm was at the back of the arm, but the arms were fixed. In Porter's anchor, with the arms moving on an axis, the palm was placed *inside* the arm. Then came the plaintiff's patent. His invention comprises three things, 1. forming or fixing the palm intermediately of the breadth of the arm,—2. forming the palm wider than the arm,—3. forming or affixing the palm of that class of anchor known as Porter's anchor at the back of the arm. And this third head of claim is explained in the subsequent reference to figure 4 of the drawings, where the inventor says,—“I am aware that it is not new to place the palm at the back of the arm of ordinary anchors: this part of the invention, therefore, consists of combining the fixing of the palms to the back of those arms of anchors which move on axes.” The anchors made by the defendants are identical with that described in figure 4, the only difference between them being that the arm, fluke or palm, and horn, are all welded in one piece. *Brunton v. Hawkes*, 4 B. & Ald. 452 (E. C. L. R. vol. 6), has nothing to do with the matter in hand, even if the question were as to the validity of the specification. The anchor *494] there *was old. The plaintiff sought to sustain a patent for a mere mode of fixing the shank to the head,—a mode long known and practised as to anchors of other descriptions. There was no misdirection at all events as to the only point which now presents itself for the consideration of the court.

Bovill, Q. C., Aston, and Sir G. Honyman, in support of the rule.—The defendants are not disputing the validity of the specification: but, being licensees called upon for an account, it is competent to them to show that the anchors in respect of which royalties are claimed are such as they might have made before the date of the plaintiff's patent. In this view, it was essential for the defendants to show what was the state of knowledge at the time the plaintiff's patent was obtained. In the Dutch anchor and in Rogers's anchor the arms were immovably *fixed* to the shank: in the former, the palm or fluke was placed sometimes in front and sometimes at the back of the arm; and in the latter it was invariably at the *back*. Porter placed the palm *inside* the arm: in his specification he claimed neither the form nor the position of the palm, but merely the fastening the arms to the shank upon an axis. The plaintiff in his specification admits that he is aware that it is not new to place the palm at the back of the arm of ordinary anchors. He could not have a patent for a matter which is cognate to that which is well known and in ordinary use. That was decided in *Horton v. Mabon*, 12 C. B. N. S. 437 (E. C. L. R. vol. 104), and *Harwood v. The Great Northern Railway Company*, 2 Best & Smith 194 (E. C. L. R. vol. 110). We must, therefore, look for a construction of the specification which will make the patent a good one. Now, the description of figure 2 affords a mode of construing the specification which

will sustain the patent,—“Figure 2 shows an anchor *made according to the first and second parts of my invention: *a* is [*495 the horn, *which will be seen to be part of the palm*, and to be wider than the arm *b*, and this is important in the construction of Porter’s as well as other anchors; and it will be further seen that the palms, instead of being formed or welded in front of the arms, are formed or fixed intermediate of the breadth of the arms in making Porter’s or other anchors, by which means the holding powers are improved; and the angle at which the palms are formed or fixed may differ from that of the arms.” That is a claim for a particular form of palm. Again, “figure 4 shows another form of anchor, and wherein the palms are affixed at the backs of the arms, and the horns form part of the palms.” This is to be read as a claim to make the horn part of the palm and to fix it on the outside of the arm. The second drawing of figure 1 shows how the horn was formed by Porter. It was perfectly competent to the defendants, after the expiration of Porter’s patent, to take all the old anchors, and apply Porter’s movable joint and Porter’s palm and horn. That is in substance what they have done: and that could be no infringement of the plaintiff’s patent. Further, the defendants forge the arm, the palm, and the horn all in one piece: whereas the plaintiff forms his palm and horn and affixes it to the arm. The definite article “the” saves the patentee from claiming that which was open to all the world before. Suppose Porter had applied his improvements to the old Dutch anchor, would he have been liable to a claim of this sort if he had been a licensee under Trotman? [BYLES, J., referred to *Ormson v. Clarke*, 14 C. B. N. S. 475 (E. C. L. R. vol. 108). There, tubular boilers for horticultural buildings had formerly been cast in several pieces,—a hollow ring with holes or sockets therein for the top and bottom, the sides being composed *of vertical tubes cast separately, which were afterwards fast- [*496 ened into the sockets of the rings by means of iron-cement. The plaintiff took out a patent for “an improvement in the manufacture of cast tubular boilers,” which improvement (found by the jury to be a useful and beneficial one) consisted in casting the whole boiler in *one piece*. It was held by the Exchequer Chamber,—affirming the judgment of this court,—that this was not the subject of a patent.] As to the difference of angle between the arm and the shank and the palm and the shank,—that was no part of the plaintiff’s claim: but it went to the jury, and probably had some influence upon their verdict. [BYLES, J.—The angle will be different as the palm is placed inside or outside or “intermediate of the breadth” of the arm.] In one sense, no doubt. Either on the ground of misdirection, or for a verdict against evidence, at all events, the cause should be submitted to another jury.

WILLES, J.—I am of opinion that this rule ought to be discharged.—It is immaterial to consider the alleged misdirection, for this reason, because it is founded upon a suggestion to the jury that the difference of the angles at which the palm and arm were placed, was a material part of the invention of the plaintiff, so that the making of an anchor of that construction in which that difference existed might bring the anchor within the description in the specification without regard to the question as to the position of the palm. That is the supposed misdi-

rection. But it is obvious that is immaterial, if upon the question of the position of the palm the argument of the defendants fails: for, if the anchor constructed by the defendants be by reason of the position of the palm within the description in the specification, it is immaterial *497] whether it be or not *also within the description in the specification, having regard to the difference in the angle. It is unnecessary to do more than consider whether the anchor constructed by the defendants be or be not within the specification, having regard to the position of the palm. For the purpose of correctly determining that question, it is necessary to consider the position in which the licensor and the licensee of a patent invention stand: and I apprehend that the licensee of a patent invention, upon the ordinary terms of the license which appears to have been adopted here, stipulates not that the patent shall be a valid one in respect of the novelty, utility, and sufficiency of the specification; but that he stipulates simply for leave to use that which is alleged to be the invention, admitting conclusively that such invention is new, useful, and properly specified. That, I apprehend, is the law, not only having regard to the position of the parties, if the question were to be considered as a new one, but also having regard to the law as established by authority. I believe the case in this court which is applicable to the question, is the case of *Hall v. Conder*, 2 C. B. N. S. 22 (E. C. L. R. vol. 89), in which the matter was very fully considered, and in which it was laid down, no doubt in accordance with the general current of the law on the subject, and I believe with the entire acquiescence of the profession, that the licensee is in the position which I have described,—that he has conclusively excluded himself from insisting as a defence upon the patent not being new, not being useful, and not being properly specified; and he has stipulated only for leave to use the alleged invention. The question, therefore, comes to this,—what is the invention which is alleged to have been made by the patentee, and which the licensee has admitted to be new and useful and well described in the specification? For *498] the *purpose of ascertaining that, it is necessary to refer to the specification, and to put the true construction upon that document. Having discharged that duty, I apprehend that nothing more is left for the court to do but to apply the specification so construed to the anchor which the defendants are admitted to have constructed; and, if that anchor comes within the description of the alleged invention in the specification, the plaintiff is entitled to recover; if it does not, the defendants are entitled to succeed. Now, before dealing with the specification, it occurs to me to be necessary to refer to what had been the condition of the improvements in anchors previously to the date of this specification; you cannot exclude the state of knowledge at that time. The state of knowledge may be shortly said to have been this,—that, whereas, in the common anchor, the palm was inside, and by reason of being inside was not at such an angle as made it most effective for the purpose of laying hold of the ground, there had been used by the Dutch in their anchors, and there had been patented in 1846 by a person of the name of Rogers, an improvement by putting the palm outside instead of inside, and the palm put outside had been used upon anchors of the ordinary kind, that is, anchors in which the arm was fixed to the shank. It appears there had been

another invention by a person of the name of Porter, to whom it occurred that it would be an improvement upon the ordinary anchor, that the arm, instead of being fixed absolutely to the shank, should be still fixed to the shank by means of a pulley at the end of it and an axle, so that the arm should catch the ground, and form when it had fixed itself there a secure hold for anchoring the vessel; and whichever part took the ground by the action of the cable on the shank of the anchor would form a greater angle than *if it had remained absolutely fixed, as before: and, as an in- [*499
cident to that invention, a horn or toggle was used, in order
that that might catch the ground, and so bring down the fluke of the anchor which should be undermost so as to work into the ground, and thus take a speedy and effectual hold. In Porter's anchor, the palm was on the inside of the arm; and, whilst the palm had been used on the outside of the arm of different anchors,—of Dutch anchors, and of anchors formed under Rogers's plan,—the arm being absolutely fixed on the shank, it had not been used on the outside of an anchor with movable arms, like Porter's anchor. That appears to be all that is necessary to be stated with reference to the previous knowledge at the time when this patent was obtained and this specification filed. According to the specification in question, there seem to have been three objects contemplated,—the first of them was a plan for fixing the palm, to use the expression in the specification, “intermediately to the breadth of the arm.” That is rather awkward language: but what it means appears to be, that, instead of having the palm either on the inside of the arm or on the outside of the arm, it was, so to speak, in the centre of the body of the arm itself. Here, we have nothing to do with that part of the specification, except so far as that Mr. Aston's argument suggested that it might be useful in determining whether the horn forming part of the arm is to be considered as being an essential part of the description of figure 4. The second object was the forming or making the horn wider than the arm; whether that was for greater strength, or for greater friction, or greater holding power, is not very material to consider. Then comes the third,—forming or affixing the palm of the class of anchors known as Porter's anchor at the back of the arm. Now, I apprehend, that, so far as that part of *the specification is concerned, there [*500
is a distinct claim to the invention of using that which had
been previously used in the Dutch anchors, and in Rogers's anchor, but had not been used in an anchor in which the arm turned upon an axis. That is claimed as being new, and as being an improvement: and, if the specification had stopped there, I suppose there would have been little doubt as to the meaning of it. The drawings annexed to the specification give forms of all these different phases of the invention, and also give the form of one of Porter's anchors, in which the horn did not form part of the palm, and in which the palm was inside: and all the diagrams relating to the invention of the plaintiff show the horn as part of the palm. That is the first matter to which our attention was directed upon the construction of the specification. It appears to me that figure 1 may be passed over without remark: figure 1 is a correct description of one of Porter's anchors. Figure 2 is an anchor made according to the first and second parts of the plain-

tiff's invention. I pass over that also, with the observation that Mr. Trotman says that it is intended to illustrate the first and second parts of the invention,—that is, to illustrate the plan by which the palm is fixed in the intermediate space between the outside and the inside of the arm, and the plan by which the horn is to be wider than the arm. That leaves altogether untouched what we are dealing with, namely, the invention by which the palm is to be placed on the outside of the arm. I apprehend that that is sufficient to exclude figure 2 and the description of it from any consideration in the present argument. Figure 3 is merely incidental. Now we come to figure 4; and, unless figure 4 and the description of it limit the plan described under the *501] third *head to some anchor, which, besides having the palm outside or at the back of the arm, and besides having the arm moving on an axis, has some other necessary condition, the defendants' anchor is unquestionably an infringement of the alleged invention; because the defendants' anchor has the palm at the outside of the arm, and it has the arm moving on an axis. Before I come to figure 4, and the description or diagram of it, I must just consider what condition it is said that imposes on the "thirdly" in the earlier part of the specification; and I understand the argument to be this,—the conditions, one of which it is said is imposed, are first, that either the horn must be part of the palm, and the specification is to be read as applying only to the palm at the outside, or the specification is to be read as applying only to a case in which there is a separate palm fixed outside, or at the back, as distinguished from the old plan, that followed by the defendants, in which the palm is forged in one piece with the rest of the arm. Now, looking at figure 4 itself, I have already stated that it does show the horn as being part of the palm; and, if the figure was to be taken as anything more than an illustration, as absolutely descriptive of the invention, no doubt the first condition would be imposed by the figure. The figure by itself is a mere illustration; it shows one individual of a species to which the invention relates. One must look at the description to see whether it can be considered as anything more than an illustration. If there had been no specification of the invention in respect of the horn, the argument might have been an exceedingly strong one; because the observation would at once arise, why refer to the horn forming part of the palm, unless it was intended to limit the invention to the particular state of circumstances? But, when you find that the horn being *502] part of the *palm for the particular purpose of being made wider, as explained by Mr. Bovill, is nothing more than a convenient mode of arriving at one object of the patent, namely, to make the horn so much wider; and, when you find in the portion of the specification directed to the description of the horn, that the fact of its being wider than the arm, without the additional circumstance that it was to form part of the palm, is claimed, it appears to me it would be straining language, and putting a forced and unnatural construction on the description of a mere illustration, to make it limit the claim in that part of the specification which is properly devoted to making the claim. I apprehend that all that is meant by having the horn form part of the palm, is, that, in this particular illustration, the horn does form part of the palm, and that is a convenient thing

to do for the purpose of having the horn wider than the arm. Again, we must not forget what was stated by Mr. Grove, viz. that here we are dealing with a patent claiming several inventions; and one of those inventions is the making the horn wider than the arm; and another of those inventions is applying the palm at the back of the arm. It is not because the illustration shows both inventions that therefore the inventor necessarily claims the combination of both, and does not claim each. It would be, as it appears to me, a grave misconstruction of the language, to use it as limiting the previous claim. Then the inventor goes on in the specification to say,—“I would remark that I am aware that it is not new to place the palm at the back of the arm of ordinary anchors; this part of the invention therefore consists of combining the fixing of the palms to the back of those arms of anchors which move on axes.” Nothing can be more distinct to show that he does claim that which has been used in ordinary *anchors as applied to what may be called in one sense extra- [*503 ordinary anchors, namely, anchors in which the arm moves on an axis. It is suggested that we ought to hold the contrary, because it is said that the patent would be invalid, if the inventor claimed this. I apprehend that we have nothing to do with the question whether the patent is good or bad; the licensee having excluded himself from raising that point. We are to look simply to what is the meaning of the language, and to determine the case between these parties, regardless of the consequences, whatever they may be. I am by no means prepared to say what result will follow from our decision, with reference to the validity or invalidity of the patent. Upon that I give no opinion. As to this part of the invention, the plaintiff states that his invention has been previously applied to ordinary anchors, and that it consists of “combining the fixing the palms to the back of those arms of anchors which move on axes.” The language may be incorrect: but it is sufficiently expressive of the meaning as to those anchors where the arm moves on an axis. Then comes the question as to the angle, the discussion of which I have already explained to be unnecessary. This specification must be read according to the ordinary rule of construction; and it does appear to me to claim the application to anchors having arms moving upon an axis, of palms at the back or outside of the arms; and that it is not necessary, to constitute an infringement of this patent, that another portion of the invention specified should also have been used, viz. the horn forming part of the palm. I think it is plain that there has been an infringement, and that the plaintiff is entitled to recover. This view of the case renders it unnecessary to enter into any other question. My Lord is not dissatisfied with the verdict; therefore, neither on the ground of law nor of *fact could we come [*504 to any other conclusion than that the rule should be discharged.

BYLES, J.—I am of the same opinion. Owing to the view which the court has taken of this case, it is quite unnecessary to decide whether the evidence which was tendered by Mr. Bovill was correctly received or not. It was received; and I cannot help saying, though it is not necessary to say so, that I think it was correctly received, upon the ground put forward by Mr. Bovill. It was one of those co-

existing circumstances which surrounded the patent, and was necessary to enable the court to put the true construction on the specification. It is also unnecessary to say a word upon the question of misdirection, for the same reason. The principal gravamen of the charge made by Mr. Aston, was, that my Lord told the jury that the angle was the thing claimed. He could not possibly have meant that a particular angle was the thing claimed, because the specification in terms says that the angle may be varied. The true meaning of that is, that it is material that there should be a certain angle with respect to the palm, which is different in regard to the arm; and that is necessary by the terms of the specification. It seems to me, if I may take the liberty of saying so, that that observation is perfectly correct. Then, what is the true meaning of the specification? This patent, as against the licensee, as has been observed more than once, must be taken to be good. Yet I agree with Mr. Bovill, that, if there are two constructions, one of which would plainly make the specification good, and the other of which would plainly make it bad, if the first construction is a reasonable and natural one, it ought to be adopted. Before this invention, there was the common anchor; in some cases the palm was *505] *there also the palm was outside the arm. Then there was Rogers's anchor, in which the palm was outside the arm. Then came Porter's anchor, where the palm was inside the arm. There was no anchor with a movable top like Porter's, where the palm was at the back of the arm. What can those words mean, which were referred to by my Brother Willes, in the specification, where it says "I would remark that I am aware it is not new to place the palm at the back of the arm of ordinary anchors," but what they have said? Now, it is necessary, in order to get out of that construction, to criticise the word "palm:" therefore, the learned counsel for the defendant says that palm here means, not what it meant some ten words before, the palm at the back of an ordinary anchor, but it means the palm with the addition of the horn; and for that he refers us to the drawings, and especially to figure 4. Now here, if my learned Brother will forgive me for rather differing from him, I should say, on looking at figure 4, that, though they may be forged in one piece, yet the word horn indicates a different part of the anchor altogether from the palm or fluke. They do certainly appear to be formed in one piece; but the whole anchor may be formed in one piece. There is, notwithstanding, the arm, the shank, and the fluke. But it seems to me that such a forced construction of the word palm is entirely prevented by the use of the word palm immediately before, as well as by the ordinary use of the word palm. Mr. Aston laid stress on the use of the definite article *the*. I cannot help thinking that the word palm is used here in the ordinary sense in which that word is used, and cannot be read otherwise, whether it makes the patent good or bad. The next objection to the verdict is this. The learned counsel had not the opportunity of hearing one another; therefore it is the less surprising *506] *that they should a little differ in this respect. Mr. Bovill, as I understood him, said, that, in the plaintiff's patent the words are "in forming or affixing the palm of that class of anchor known as Porter's anchor at the back of the arm;" whereas, he says,

we make them, or forge them, all in one piece. Then, the objection seems to be disposed of at once by the case of *Ormson v. Clarke*, 14 C. B. N. S. 475 (E. C. L. R. vol. 108). There, a boiler had been cast in several pieces, and a man took out a patent for casting it in one piece, which was held to be bad. The ground had been preoccupied by the public casting generally, and it could not be invaded by a monopolist. Apply that case to the present. Here, the patentee has, so far as regards the state of things between the licenser and the licensees, anticipated the defendants, and no individual can use it. Upon these grounds, I conceive that the construction of the specification is quite plain; and that there are no grounds for this rule being made absolute.

ERLE, C. J.—After what has been said, I will not add much. I think evidence is admissible to throw a light upon the meaning of the words of a written instrument at the time when they were used, but that it cannot alter the meaning of the words according to their ordinary acceptation; and, so reading this specification, I take it to have claimed that which is the subject of the claim. There are the first, second, and third claims; they are in effect three separate patents. The intermediate palm I call the subject of the first patent, which we have nothing to do with; the horn being made wider is the subject of the second patent, with which we have nothing to do; the third patent is for an invention in forming or affixing the palm at the back of the arm of Porter's anchor. I strike out "or affixing," because if either the palm is formed or *the palm is affixed at the back of the arm of Porter's anchor, the claim is made. I am not at [*507 liberty to alter the plain meaning of those words by reference to effects that would be produced by looking at the surrounding circumstances. Then, have the defendants formed the palm of an anchor at the back of the arm of Porter's anchor? I am very clear that they have adopted the very form of anchor,—not that the patent is confined to that; they have substituted as an adoption of the plaintiff's invention the identical form which it appeared the plaintiff had used. Now, the great point for the defendants is, that the way in which the plaintiff formed the palm at the back of the arm was by forming a palm and then joining it on at the back of the arm. I am of opinion that the patent was not for the mode of making the palm, but that it was for the form. The whole value of the patent lay in this form. Many attempts had been made, but the plaintiff attained that which by experience has been found to be the most available form: and I am of opinion that this patent was for forming the palm at the back of the arm. Mr. Trotman formed the palm separately and then joined it on to the arm. The defendants took a large piece of iron capable of forming the arm and at the same time the palm at the back. Of course, when iron is at a certain state of heat, it can be formed into any shape the parties choose. The defendants have taken the identical form of anchor which Mr. Trotman specified, and have got the benefit of his invention; but they have made it by welding in one piece instead of making the palm separately and joining it on afterwards. I think that was an infringement. All that was said about the angle, was, not that it was a patent for any particular angle; but that it exemplified the value of the invention; and, as I understood the

*508] evidence of some of the witnesses, the difference in the angle would *have the effect of producing a very valuable result. It was specified, not as a part of the patent, but as one of the important results that would follow from the invention. I believe it was in that sense I understood it and so expressed myself in the observations I made to the jury on that part of the case. I think, therefore, the rule should be discharged.

KEATING, J., was sitting in the Divorce Court.

Rule discharged.

THOMAS v. WELLS. April 26.

Where an order has been obtained for the winding-up of a joint-stock company, and an official manager and creditors' representative have been duly appointed and chosen, an action brought by a creditor against a shareholder or contributory thereof in contravention of the provisions of the 11 & 12 Vict. c. 45, s. 73, and 20 & 21 Vict. c. 78, s. 7, may be stayed by the court or a judge of the court out of which the writ issues.

The insolvency of a member or shareholder of a joint-stock company does not operate a dissolution of the company, whether it be incorporated or unincorporated.

ON a former day in this Term, *J. Brown*, on behalf of the defendant, obtained a rule calling upon the plaintiff to show cause why the proceedings in this action should not be stayed, on the ground that the same had been commenced and was being proceeded with in violation of the Joint-Stock Companies Winding-up Act, 1857, 20 & 21 Vict. c. 78. The affidavit upon which the motion was founded, stated,—

"1. That, in and prior to the year 1857, the defendant was a shareholder in and director of the National Assurance and Investment Association, which is now in course of winding up before the Master of the Rolls :

*509] "2. That the defendant ceased to be a member of the said association at the general meeting in the year *1857, and transferred all his shares therein to F. M. Wells by properly executed deeds of transfer on the 6th of July and 30th of September, 1857; that the said deeds were properly left for registration at the office of the association shortly after their execution, as required by the deed of settlement of the association; and that, by the means aforesaid, the defendant ceased to be a director and shareholder of the said association :

"3. That, on the 16th of November, 1861, an order absolute was made by the Master of the Rolls in the Matter of the Joint-Stock Companies Winding-up Acts, 1848 and 1849, and of the Joint-Stock Companies Winding-up Amendment Act, 1857, and in the Matter of the said National Assurance and Investment Association, for winding up the affairs of the said association, which order is still in force:

"4. That, on the 26th of November, 1861, R. P. Harding was duly appointed the official manager of the said association, under the provisions of the two first-mentioned acts:

"5. That, on the 15th of May, 1862, a meeting of the creditors of the said association was duly convened by the Master of the Rolls, by advertisement, as required by the said Joint-Stock Companies Winding-up Amendment Act, 1857, and held before the Master of

the Rolls, for the purpose of appointing creditors' representatives of the said association in and about the said winding-up proceedings before him; and at such meeting C. Neshitt, J. R. Monday, and C. W. Viner, were duly chosen and appointed the creditors' representatives of the said association, pursuant to the provisions of the said Joint-Stock Companies Winding-up Amendment Act, 1857, and accepted such appointment:

"6. That, after the said order for winding up the said association was made, the defendant was included *by the chief clerk of the Master of the Rolls, to whose court the said winding-up order was attached, in Class C. of the list of contributories of the said association:

"7. That the defendant contested his liability to be included in the list of contributories of the said association; but a compromise was made between him and the official manager and creditors' representatives in May, 1865, by which he paid to the official manager, who accepted the same, the sum of 5000*l.* in full discharge of all liability of the defendant as a member or contributory of the said association:

"8. That, on the occasion of the said compromise, viz. on the 30th of May, 1863, an indenture of release was made and executed by and between the official manager of the first part, the creditors' representatives of the second part, and the defendant of the third part:

"9. That the Master of the Rolls approved of and gave leave for the said compromise to be carried out; and on the 2d of June, 1863, granted the defendant a certificate,—a copy of which was set out:

"10. That, on the 3d of January, 1863, the plaintiff issued out of this court a writ of summons against the defendant, claiming by the endorsement thereon 60*l.* 'for money lent and advanced by the plaintiff to the defendant at his request, and for money had and received by the defendant for the use of the plaintiff,' with interest thereon at 5*l.* per cent. per annum from the 1st of January, 1861:

"13. That, on the 18th of March, 1864,—being long after the Master of the Rolls had by advertisement as aforesaid called on the creditors of the said association to appoint such representatives as aforesaid, the plaintiff delivered a declaration in this action,—a copy of which was set out:

* "14. That, on the 24th of March, 1864, the plaintiff, pursuant to a judge's order, delivered the following further and better particulars,—

"April 12th, 1859. For money lent and advanced on this day by the plaintiff to the defendant at his request, and for money then had and received of the plaintiff by the defendant for the use of the plaintiff £60 0 0

"The plaintiff also claims interest upon the above sum after the rate of 5*l.* per cent. per annum, from the 1st of January, 1861, until payment.

"The plaintiff also seeks to recover the above sum on accounts stated.

"And the plaintiff also seeks to recover the above several sums of money and damages from the defendant as a member of a certain partnership existing on the said 12th of April, 1859, trading under the style of The National Assurance and Investment Association, and which said partnership has since been dissolved and put an end to;

and she is not suing the defendant as a member of a certain alleged association called The National Assurance and Investment Association, which said last-mentioned alleged association is now being wound up under the provisions of a certain act of parliament made and passed in the 12th year of the reign of our sovereign lady the now Queen, and called The Joint-Stock Companies Winding-up Act, 1848, 11 & 12 Vict. c. 45.'

"And on the 4th of April, 1864, in pursuance of another judge's order, the plaintiff delivered further and better particulars, stating that 'the business of the said association mentioned in the particulars delivered in this action was at the time of the said loan carried on on premises situate at No. 3, Pall Mall East, in the county of Middlesex, and on premises situate at No. 6, Edgar Buildings, Bath, in the county *512] of Somerset, *which said premises at Pall Mall East were the head offices, and the said premises at Bath a branch office of the said association; and the loan by the plaintiff to the defendant was made at the last-mentioned place of business:'

"15. That the said National Assurance and Investment Association which is so being wound up as aforesaid, at the time of the alleged loan by the plaintiff in this action carried on its business at, amongst other places, 3, Pall Mall East, in the county of Middlesex, and 6 Edgar Buildings, Bath, in the county of Somerset; and that, save the said association so being wound up, the deponent never heard of any association or any partnership trading under the style of The National Assurance and Investment Association at the said two places or either of them, or any other place; and that no such partnership ever existed:

"16. That the plaintiff had also brought an action against Lord George Paget, another shareholder and director of the said association, to recover the same sum of 60*l.*, and a special case had been stated in that action and set down for argument in this court: (a)

"19. That the plaintiff proved against the said association which is so being wound up for the same sum of 60*l.* and interest which she is claiming against the defendant in this action,"—a copy of her affidavit filed the 17th of January, 1862, was set out:

"22. That the said association had not been adjudged bankrupt, and no leave whatever had been given by the Master of the Rolls, his chief clerk, or any other authority in that behalf, to the plaintiff to bring or prosecute the said action against the defendant, and the same *513] was not brought for the purpose of *making the said company bankrupt, but was being prosecuted contrary to the said Joint-Stock Companies Winding-up Amendment Act, 1857, and contrary to the terms of the said compromise so made by the defendant as aforesaid, and to the statutes aforesaid."

Ogle and *Thesiger* now showed cause, upon affidavits containing, amongst other things, the following statements,—

"1. That, on or about the 28th of May, 1844, by a deed-poll under the hands and seals of certain persons therein named, a certain association was formed, calling themselves 'The National Assurance and Investment Association, consisting of the several persons therein

(a) After this rule was disposed of, a judge's order was obtained for staying the proceedings in that action also, and consequently the special case was withdrawn.

mentioned and such others as should thereafter become members thereof either as assurers or as the holders and proprietors of stock, the objects of which association were,—first, the mutual assurance of lives, and endowments, deferred terms, and annuities,—secondly, the receipt and investment of money in progressive stock, either for accumulation, by adding the annual interest to the principal sum, or for yearly income, by paying the interest as dividends,—thirdly, the granting of loans upon real and personal securities, and advancements upon investment stock :

“2. That, at the time of the passing of the 7 & 8 Vict. c. 110, the act for the registration, incorporation, and regulation of joint-stock companies, the said association, consisting of more than seven persons, and being an association within the operation of the 2d section of the said act, registered itself on or about the 8th of January, 1845, under the 58th section of the said act as a company existing at the time of the passing of the said act, in the words and figures following,—

““Name and business, &c., of exist- ing companies	{ The National Assurance Invest- ment Association. Dated 8th January, 1845. [514
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“1. Name of company	{ National Assurance and Investment As- sociation.
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“2. Business of the company	{ The granting assurances on lives, deferred terms, and annuities, and for the im- provement of surplus and savings.
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“3. Place of business, with branches, if any	{ No. 4. Lancaster Place, Strand, London. Branches, Manchester and elsewhere.’
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and which said registration was the sole act of registration performed by the said association :

“3. That the said association, having carried on the said business for several years, was on or before the month of December, 1851, dissolved and put an end to ; and that certain persons other than those forming the said association entered into another and perfectly distinct copartnership for an indefinite period, and for the purpose of carrying on the businesses in the said deed-poll mentioned ; and that, by a certain indenture of settlement, dated on or about the 9th of December, 1851, and purporting to have been made between the several persons who had sealed and delivered, and who from time to time should seal and deliver the said indenture, except H. Murray and J. C. Dale, therein described, the said several persons parties thereto of the first part did covenant with the said H. Murray and J. C. Dale that the several persons parties to the said indenture of settlement, and every other person who had effected and should from time to time effect any assurance with the said last-mentioned association on the life of any person, for the whole continuance thereof, on condition of participating in profits in manner thereafter mentioned, or who then was or should thereafter become the holder *or pro- [515
prietor of any stock of the said association, should so long
only as they should respectively keep their respective policies of
assurance in force, or should continue to hold or be proprietors
of stock of the said association, be and continue an association, by
the name of ‘The National Assurance and Investment Association,’
for the purposes therein mentioned ; and that the business and objects

of the said last-mentioned association were and should be (amongst other things),—first, in the investment department, the receipt of moneys for investment, and the investment thereof upon such terms and in such manner as in the said indenture of settlement mentioned, —secondly, in the assurance department, the effecting of assurances on lives and survivorships, and all such other assurances on events or contingencies connected with the duration of life, as might be effected according to law, and the carrying out of all business usually incident to and connected with the business of life assurance:

“4. That the defendant executed the said deed of settlement, and thereby became a party thereto of the first part; and that he became a holder of the capital stock of the said association, and thereby and by other means became a partner in the said last-mentioned association, and so remained and continued such partner up to and until the dissolution thereof *by the insolvency of one James Adair* as therein-after mentioned; and that he the defendant, on the 12th of April, 1859, when the plaintiff so lent and advanced the said sum of 60*l.* to the said last-mentioned association, was as such partner justly and truly indebted to the plaintiff in the said sum of 60*l.*, with interest thereon; and that such last-mentioned sum still remained wholly due and owing from the defendant as such partner to the plaintiff:

*516] “5. That the said James Adair also executed the *deed of settlement, and thereby became a party thereto of the first part; and that he the said James Adair became a holder of capital stock of the said association, and thereby and by other means became a partner therein:

“6. That the said *last-mentioned* association did on or about the 2d of June, 1854, obtain an act of parliament (17 & 18 Vict. c. xliii.), which,—after reciting amongst other things that the said association was called and known by the name of The National Assurance and Investment Association, and that, by reason of the multiplicity of the transactions which the said last-mentioned association had entered into, and were continuing to enter into, it was expedient that they should have conferred upon them the powers of suing and being sued in the name of the said last-mentioned association, or in the name of some director of the said association,—it was enacted that all proceedings, whether at law or in equity, and all legal proceedings whatever, might be commenced, made, instituted, and prosecuted in the name and by the description of ‘The National Assurance and Investment Association;’ and that all such proceedings might be commenced, instituted, and prosecuted against the said association by the name and description of ‘The National Assurance and Investment Association;’ and that any person being a member of the said last-mentioned association should in all cases either alone or jointly with any other person be liable to be sued or proceeded against by or for the benefit of the said last-mentioned association; but that nothing in the said act should extend or be construed to extend to incorporate the said association, or to relieve or discharge the association or any of the members thereof from any responsibility, contract, duty, or obligation whatsoever, to which by law they or any of them then

*517] were or at any *time thereafter might be subject or liable as between the association and others:

"7. That the said James Adair, whilst he was such partner of the said last-mentioned association, and whilst he was indebted to the plaintiff as such partner in the said sum of money so lent and advanced by her as aforesaid, and before the date of the winding-up order before mentioned, became insolvent and took the benefit of the Insolvent Debtors Act, &c., and that the said James Adair subsequently received his order of discharge, and thereby was exonerated and released from all liability to the payment of the debts of the said association :

"8. That on such insolvency taking place, and the said discharge of the said James Adair as before mentioned, the said association to which the money had been lent as before mentioned whilst the defendant and James Adair were such partners thereof as aforesaid, *became wholly dissolved* and put an end to; and that, at the time of the making of the said winding-up order, there was no association which by the provisions of the said act of parliament of 1854 was empowered or rendered liable to sue or be sued by the name or description of 'The National Assurance and Investment Association :'

"9. That, in an action brought by one Williams against the defendant under circumstances exactly similar to those of the present action (except as to the sum claimed), the defendant stated upon oath that he had parted with and transferred 1000*l.*, part of the capital stock of the said association, to one F. M. Wells on the 6th of July, 1857, and that he parted with and transferred 500*l.*, residue thereof, to the same person on the 30th of September, 1857, 'the said F. M. Wells being his cousin, and not being well off,' and that he therefore transferred the said stock to him 'as a gift *by way of advancement, and in order that he the said F. M. Wells might be qualified for a [*518 seat in the direction of the said last-mentioned association :'

"16. That the said association was formed after the said act for the registration, &c., of joint-stock companies (7 & 8 Vict. c. 110) came into operation, and that the said association was established for commercial purposes, and for the purpose of profit, and for the purpose of assurance or insurance, within the provision of the 2d section of the last-mentioned statute; and that it carried on the business hereinbefore mentioned and in the said deed of settlement specified, without being incorporated or registered, and in direct violation of the provisions of the last-mentioned statute; and that, from the time of the formation of the said association until the dissolution thereof as thereinbefore mentioned, the said association was not either provisionally or completely registered pursuant to the several statutes in that behalf, and was during the whole of the period of its existence an unincorporated company; and that the several members thereof were (subject to a plea in abatement for the non-joinder of other parties) personally responsible to the plaintiff as a creditor of the said association; and that the said association was a partnership subject to the liabilities and inconveniences of a common-law partnership, and such association during the whole period of its existence illegally and fraudulently conducted and carried on the business of effecting insurances on lives, and as bankers, without the slightest compliance with the requisites of the several statutes made and then in force for the regulation and management of such companies."

This rule was obtained under the 7th section of the 20 & 21 Vict. c. 78, which enacts that, "when any such company heretofore has *519] been or hereafter shall *be adjudged bankrupt, then, if and so soon as creditors' assignees shall have been appointed, or where any company shall not have been or be adjudicated bankrupt, then after the judge or master shall by advertisement have called on the creditors to appoint a representative or representatives as hereinafter mentioned, no such action as is mentioned in the 73d section of the Joint-Stock Companies Winding-up Act, 1848, 11 & 12 Vict. c. 45,(a) shall be commenced or proceeded with otherwise than for the purpose of making the company bankrupt, nor shall any execution or scire facias be issued or proceeded with against the person, property, or effects of any member or members for the time being of such company, or any former member or members thereof, except by leave of the court of bankruptcy, where such company has been made bankrupt before an order shall have been made for winding up the company, or of the said judge or master where such company has not been made bankrupt before such order shall been made," &c. Under this act, the court or a judge of the court in which the action is brought has no power to stay the proceedings. The 58th section expressly enacts, that, "except as is by this act expressly provided, *520] nothing in this act contained, nor any petition *or order under the same for the dissolution and winding-up or for the winding-up of any company, shall extend or enlarge, diminish, prejudice, or in any wise alter or affect the rights or remedies of creditors or other persons not being contributories of the company, or the rights or remedies of creditors being also contributories, but being creditors of the company upon a distinct and independent account, whether against the company or against any of the contributories of the same, nor the rights or remedies of the company against any contributories or other persons, nor shall alter or affect any contracts or engagements entered into by or with the company, or any person acting on behalf of the same, previously to any such petition, nor any actions, suits, or other proceedings pending at the date of such petition." The proper course is, to apply to the Master of the Rolls, before whom the winding-up proceedings are being taken, and whose decision, if erroneous, may be reviewed by the Lords Justices and the House of Lords,—s. 6: whereas, if this court stays the proceedings, the plaintiff is left without remedy. Further, the winding-up acts, 11 & 12 Vict. c. 45, and 12 & 13 Vict. c. 108, do not apply to this company, and therefore the Master of the Rolls had no jurisdiction to make the order. The company was originally established in 1844, and consisted of between twenty and thirty members, by whom the deed-poll was executed: it was therefore a company requiring registration under the 7 & 8 Vict.

(a) Which enacts, that, "after the first appointment of an official manager, no creditor or other person shall, except so far as the master shall permit, have power to commence or to proceed with any action against the official manager or against the company, or any other person representing the same, or who is sued as a contributory thereof, until after proof, or exhibiting or making such proof as he may be able, of his debt or demand before the master, as hereinafter mentioned; and it shall be lawful for any judge of the court in which such action shall be pending, upon summons taken out before him for that purpose, to order that all further proceedings in such action shall be stayed until after such proof shall have been made or exhibited before the master."

c. 110, s. 4. This company came in and complied with that regulation, and went on as an incorporated company. In December, 1851, a new deed of settlement was prepared: but, in order to get over the difficulty created by the statute which required all companies established after September, 1844, to be completely registered, the company issued a prospectus stating that they *were established in 1844. In [*521 1854, they obtained an act to enable them to sue and be sued in the name of The National Assurance and Investment Company. In 1861, by the insolvency of Adair, one of the partners, the company became dissolved. The provision contained in the 81st clause of the deed of settlement cannot contravene the general rule of law that insolvency dissolves a partnership: see Story on Partnership, § 208. The plaintiff paid her money in 1859. Wells was then a member and a director. He professes to have disposed of his shares in 1863: but, unless the company was completely registered, he could not dispose of them. The company of which Wells was a member having ceased to exist, there was nothing for the winding-up order to operate upon, and consequently the compromise which he made with the official manager affords no answer to this action.

Field and *J. Brown*, in support of the rule.—This application rests upon two grounds,—first, that the plaintiff has not obtained the leave of the Master of the Rolls to commence or proceed with the action, as required by s. 7 of the 20 & 21 Vict. c. 78,—secondly, that a valid compromise and release have been effected under s. 3. This was a company within the Winding-up Acts, 11 & 12 Vict. c. 45, and 12 & 13 Vict. c. 108, and therefore the Master of the Rolls had power to make the order for winding it up. The company was provisionally registered as an existing company under the 7 & 8 Vict. c. 110. And the 12 & 13 Vict. c. 108, s. 1, expressly enacts that, “notwithstanding anything in the said act (11 & 12 Vict. c. 45) contained importing a more limited application thereof, the same shall apply to all partnerships, associations, and companies whereof the partners or associates are not less than seven in number, whether incorporated or unincorporated, *and whether formed or subsisting before or after the [*522 passing of the said act or this act, other than and except railway companies incorporated by act of parliament, to which companies such act shall not apply.” [They were stopped by the Court.]

ERLE, C. J.—I am of opinion that this rule should be made absolute, for a stay of the proceedings; and I found my judgment upon the 7th section of the 20 & 21 Vict. c. 78, which provides, that, after certain steps shall have been taken in the process of winding-up a joint-stock company, no such action as is mentioned in the Winding-up Act of 1848, 11 & 12 Vict. c. 45, shall be commenced or proceeded with without leave of the Master of the Rolls. The company in question has been put into a course of winding up; and I am very clear, that, under the 11 & 12 Vict. c. 45, power was given to the Master of the Rolls to order it to be wound up. The words are very plain: and the process of winding-up has proceeded far enough to make the 7th section applicable: the creditors have been called upon to appoint a representative; and after that event has taken place no action is to be brought against any member of the company without the leave of the Master of the Rolls. Reference is made to the 73d section of the first

act for winding up joint-stock companies, 11 & 12 Vict. c. 45, where power is expressly given to the judges of the court where such action may be commenced. If there had been no such reference, I am perfectly clear that the 7th section of the 20 & 21 Vict. c. 78 gives me authority to say that the process of the court is misapplied in attempting to prosecute an action which has been commenced in defiance of the prohibition of the act of parliament. Mr. Ogle has strenuously urged, that, if we stay the plaintiff's proceedings, we shall deprive her *523] of the *power of appeal which the statute contemplated, and which is the general safeguard the law has provided to insure justice to the suitor. But it seems to me that the statute operates directly against that argument. If we were to refuse to stay the proceedings, the defendant would be without remedy: whereas, if we make the rule absolute, its only effect will be to stay the proceedings until the plaintiff chooses to go before the Master of the Rolls and ask leave to proceed. If the Master of the Rolls sees fit to give leave, so be it: the action will then go on. If he refuses to grant leave, then of course the appeal mentioned in the statute will lie to the Lord Chancellor or the Lords Justices, and the decision of the Master of the Rolls, if erroneous, will be set right. There never was a case in which the argument which has been urged before us so little applies. This is only a stay of proceedings quousque, not a prohibition for ever. Then it is said that this was a company which came into existence long before the year 1861, and that, by reason of the insolvency of Mr. Adair in 1861, the old company was dissolved, and that there are in fact now two companies existing for the purpose of being wound up,—the one consisting of the subscribers who had remained down to that time,—the other, of those who held on and the new subscribers who came in after the alleged dissolution of the original company in 1861. Where the assets of a company are vested in trustees, the shareholders are not partners so that the bankruptcy, insolvency, or death of any one of them should effect a dissolution; they have no interest in the assets of the company beyond a share in its profits. This is well understood: in the case of land, the question has arisen many times; and it has invariably been held, that, where the shareholders or proprietors of stock are entitled only to participate in profits, the *524] land and *other property of the concern being vested in trustees who have the sole control and management, the shareholders have no interest in the land. The question has been before us recently in the case of a claim on the part of the shareholders to be registered as voters.^(a) I do not stop to inquire whether the shareholders in this company fall within this category, because I find in the 81st clause of the original deed of settlement of the company this provision,—“That the husbands of female stockholders, or the executors or administrators of deceased stockholders, or the assignees of bankrupt or insolvent stockholders, and the committee of lunatic stockholders, shall not be members of the association in respect of the stock to which they are entitled in any of those capacities; but any such husbands, executors, or administrators may sell and transfer, or return and procure the cancellation of such stock, in manner herein

(a) See *Bulmer, app., Norris, resp.*, 9 C. B. N. S. 19 (*E. C. L. R.* vol. 99), and *Acland, app., Lewis, resp.*, 9 C. B. N. S. 32.

expressed, or become members of the association in respect of such stock on leaving at the office of the association notice in writing of such desire, expressing the name and place of abode and proper addition of the person giving the same, and the name of the stockholders in whose place or right he claims, and the amount of stock in respect of which he is desirous of becoming a member; whereupon, and upon otherwise complying with the provisions of these presents, he shall become a member of the association in respect of such stock, and the same shall be transferred into his name, and he shall be personally charged with the duties and liabilities (if any) incident to the ownership of the same." Here is an express provision that the company shall not be affected by the death, bankruptcy, or insolvency of any of its members, but shall continue as to the other *members as if no death, bankruptcy, or insolvency had taken place. That [*525 is a perfectly valid arrangement as between the shareholders themselves. It may be that Mr. Ogle's argument that that arrangement, though valid and binding amongst the shareholders of the company, has no binding effect upon creditors of the concern, may be a perfectly valid one; and it may be that the creditors whose debts were contracted prior to 1861 may be a different body and have different rights and remedies from those whose debts are of more recent date, and that, though a continuing partnership as amongst the shareholders themselves, this association may be treated as two several partnerships quoad the two sets of creditors. But the Winding-up Act has provided for that state of things: it contains provisions for making several classes of contributories according to their respective rights and liabilities. I therefore can see no ground for any of the objections which have been urged before us, and I think the statute gives the defendant a clear right to have the proceedings stayed. I have the less misgiving or doubt in this case, because this defendant has paid 5000*l.* to the official manager, the person legally authorized to make compromises, and the present plaintiff has come in and proved in respect of her claim under the Winding-up Act, and she will in due course receive her share of that money. Notwithstanding this, if we declined to stay her proceedings, she would go on and recover in this action her whole claim against one who has been induced upon the faith of the act of parliament to pay a large sum for his release from all further liability. For these reasons I think the rule must be made absolute.

WILLES, J.—I am of the same opinion.

BYLES, J.—I am of the same opinion. It seems to *me that the foundation for Mr. Ogle's argument fails as soon as the provisions of the 11 & 12 Vict. c. 45, and 20 & 21 Vict. c. 78, are read and understood. The first act appears to me to be sufficient: but the words of the last act are, as the learned counsel for the defendant has shown, all comprehensive. There cannot, therefore, be any doubt that the Master of the Rolls had jurisdiction to make the order for winding up this company. The only question then is, who is to stay the proceedings in this action. The Master of the Rolls has no jurisdiction over the proceedings of this court: all he can do is to operate upon the person of the plaintiff, and to restrain him under pain of contempt. The more natural course I conceive to be that the court

in which the action is brought should stay the proceedings, when it is made to appear that the action is brought in violation of an act of parliament. It is to be observed that the two acts of 11 & 12 Vict. c. 45, and 20 & 21 Vict. c. 78, are by an express provision in the latter act (s. 14) to be read together as one act of parliament. Now, the 73d section of the former act gives power to stay proceedings; and the 7th section of the latter act enlarges those powers. The 73d section of the 11 & 12 Vict. c. 45 says how the action shall be stayed,—“It shall be lawful for any judge of the court in which such action shall be pending, upon summons taken out before him for that purpose, to order that all further proceedings in such action shall be stayed until after such proof shall have been made or exhibited before the master.” It seems to me that those words put a sense on the words “commence or proceed with” in the subsequent act of parliament. It is for the court in which the action is brought to stay the proceedings. I agree that the Master of the Rolls had jurisdiction to make the winding-up *527] order, and has rightly exercised it; and that *this is the proper court to apply to for a stay of the proceedings. Besides, as my Lord has observed, it is not competent to the plaintiff to find fault with a proceeding which she herself has sanctioned by coming in and proving under it, and under which she still has rights.

KEATING, J.—I am of the same opinion. It seems to me to be perfectly clear that the Master of the Rolls had jurisdiction to order the winding-up of this company. And I am equally clear that the proceedings which have been taken in this court are in contravention of the act of parliament, and that this court has jurisdiction to stay them.

Rule absolute.

SHARPE v. GIBBS and Others. April 18.

A mortgage-security executed by two (and the wife of the third) of three persons indebted to the mortgagee in a simple contract debt, does not operate as a merger of the claim on the simple contract in the specialty.

THIS was an action brought by the plaintiff, an estate-agent, to recover a sum of 109*l.* for work done, and journeys, &c., for Gibbs and two others in the sale of certain property in which they were jointly interested.

At the trial before Erle, C. J., at the sittings in London after last term, it appeared, that, after the debt had been contracted, a mortgage was proposed to be given by the three to secure the debt, and that a deed was actually prepared and executed by two of them and by the wife of the third, who was the party beneficially interested.

*528] It was objected, on the part of the defendants, that *the plaintiff's remedy upon the simple contract-debt was merged in the specialty.

His Lordship overruled the objection, and the plaintiff had a verdict for the amount claimed.

Pearce now moved, pursuant to leave, to enter a nonsuit, relying upon *Price v. Moulton*, 10 C. B. 561 (E. C. L. R. vol. 70), where it was held that a bond or covenant given to secure an existing debt, irrespectively of the intention of the parties, operates in law as a

merger of the remedy for the simple-contract debt. [BYLES, J.—The action is against three: the security is executed only by two.] It is the same debt. Maule, J., in the case referred to, says,—“Upon the authorities, and the general understanding of the profession, I think it is quite clear that a man cannot have a remedy by covenant and by assumpsit for the same debt: the two are wholly incompatible, and cannot co-exist. If the promise was made before the covenant, the latter must prevail. The intention of the parties has nothing to do with that. I entirely agree with the dictum of Parke, B., in the case of *The Norfolk Railway Company v. Macnamara*, 3 Exch. 628, where he says: ‘If the bond or covenant had been for the identical debt, the plea would have been a good answer, without the additional allegation that the instrument was given in satisfaction.’ The policy of the law is, that there shall not be two subsisting remedies, one upon the covenant, and another upon the simple contract, by the same person against the same person for the same demand.”

ERLE, C. J.—This is an action against three persons for the recovery of a simple-contract debt due from the three. The evidence showed that the three were jointly liable. The question is, whether any defence *arises by reason of a mortgage-deed to secure the [*529 joint debt having been executed by two only of the debtors, though intended to be executed by the third also. As it stands, it is executed by two only, for the execution by the wife of the third may be laid out of consideration. Does the liability of the three on the simple contract merge by reason of the specialty by two? I am of opinion that it does not. The simple-contract debt must in its entirety become a specialty debt, and the remedy on the deed must be co-extensive with that for the simple-contract debt. For this *Ansell v. Baker*, 15 Q. B. 20 (E. C. L. R. vol. 69), is a distinct authority. There, Baker and Last were indebted to the plaintiff's testator upon a joint and several promissory note; and Last afterwards executed a mortgage with a covenant to pay the same debt: and the court held that this did not take away the plaintiff's remedy upon the note, because the specialty security was confined to one of the debtors only, and so the remedy thereon was not co-extensive with the remedy which the creditor had upon the note. That is precisely applicable here.

WILLES, J.—I am of the same opinion: and I adopt the view taken in *Byles on Bills*, 8th edit. 216,—“The taking of a co-extensive security of a higher nature for a bill or note, merges the remedy on the inferior instrument.” “But,” the learned author adds, “it must be strictly co-extensive. Therefore, a specialty given by one maker of a joint and several note does not merge the remedy on the note:” citing *Ansell v. Baker*.(a) That is a correct statement of the law. Here, the remedy which the plaintiff would have upon the deed, it having been executed by two of the debtors only, would *not [*530 be co-extensive with the remedy which he before had for the simple-contract debt.

BYLES, J.—I am of the same opinion. If Mr. Pearce's argument were to prevail, a greater burthen would be cast upon the two who executed the deed. *Ansell v. Baker* is a distinct authority.

KEATING, J., was engaged in the Divorce Court.

Rule refused.

(a) He further adds in a note,—“*Quære* as to the effect where the note is joint only?”

MALLET v. BATEMAN. *April 30.*

The plaintiff had contracted to supply goods to C. & Co., to be paid for in cash on each delivery. C. & Co., being desirous of obtaining the goods on credit, the defendant (who had an interest in the performance of the work upon which the goods were to be used) promised the plaintiff, that, if he would supply the goods to C. & Co. at a month's credit, and would allow him (the defendant) 3 per cent. upon the amount of the invoice, he would pay him cash, and take C. & Co.'s bill, without recourse:—Held, a contract to answer for the debt or default of another, within the 4th section of the Statute of Frauds.

THE first count of the declaration stated, that, in consideration that the plaintiff would sell and deliver to certain persons trading under the firm of G. J. Calvert & Co., certain goods, to wit, patent buckled plates, which they had ordered and contracted to buy of the plaintiff, without the plaintiff requiring payment in cash for the prices of the same on the delivery thereof, and would take from them their acceptance to a bill of exchange drawn by the plaintiff upon and directed to them, for the payment of the prices of the said goods to the plaintiff's order one month after the date thereof, and would endorse and deliver the same to the defendant, and would permit the defendant to deduct from the amount of the said bill a certain sum, to wit, at the rate of *531] 3*l.* per cent. on the amount of the *money payable by the said bill for his cashing or discounting the same and indemnifying and protecting the plaintiff as thereafter mentioned, the defendant promised the plaintiff to cash or discount the said bill for the plaintiff, and indemnify and protect him from the payment thereof: that the plaintiff thereupon sold and delivered to the said G. J. Calvert & Co. the said goods without requiring payment in cash for the prices of the same on the delivery thereof, and took from them their acceptance to a bill of exchange drawn by the plaintiff upon and directed to the said G. J. Calvert & Co. for the payment of the sum of 603*l.* 14*s.* 10*d.*, the prices of the said goods, to the plaintiff's order, one month after the date thereof: And that, although the plaintiff was ready and willing to allow the defendant to make the said deduction, and to do, and the plaintiff did, all things, and although all things were done and happened and existed, and times elapsed, to entitle the plaintiff to a performance by the defendant of his said promise, and to have the said bill cashed or discounted by him, and to be indemnified and protected as aforesaid, yet the defendant made default in cashing and discounting the said bill as aforesaid, and in indemnifying and protecting the plaintiff from the payment of it, and wholly neglected and refused to cash or discount the said bill for the plaintiff, or to indemnify and protect him from the payment of it.

The second count was for money payable by the defendant to the plaintiff for goods sold and delivered by the plaintiff to the defendant, and for work and labour done and materials provided by the plaintiff for the defendant at his request and for money paid, money received, and money found due on accounts stated.

*532] The defendant pleaded,—to the first count, 1. That *he did not promise as therein alleged, 2. that the plaintiff was not ready or willing to allow the defendant to make the said deduction as alleged,—and to the residue of the declaration, never indebted.

The particulars of demand were as follows:—

"The particulars of the plaintiff's claim under the first count of the declaration consist of the damages which he has sustained by the defendant not cashing or discounting the bill therein mentioned, and indemnifying the plaintiff from the payment of it, and which damages the plaintiff estimates at the amount of the bill, viz. 603*l.* 14*s.* 10*d.*, less the 3*l.* per cent. mentioned in the said count.

"Under the common counts of the declaration the plaintiff will seek to recover the sum of 603*l.* 14*s.* 10*d.*, due as follows:—

"1862. Jan. 3. 679 Patent buckled plates each
3.8*1*/₄ × 3. 10 × *1*/₄. weight 43.8.1.15 . £603 14 10."

The cause was tried before Erle, C. J., at the sittings in London after Michaelmas Term last, when the following facts appeared in evidence:—The plaintiff is a civil engineer, and the patentee of certain buckled plates used for bridge flooring. The defendant is a metal-broker and iron-merchant trading under the firm of Bateman & Co. The plaintiff had through the defendant entered into a contract with Messrs. Calvert & Co., who were engineers at York, to supply them with buckled plates to be used in the construction of a railway bridge which they were erecting at Chelsea under a contract with Messrs. Brassey & Co. The defendant, having made advances to Calvert & Co., and taken an assignment of their contract with Messrs. Brassey & Co. as a security, had an interest in the completion of the work. After a considerable quantity of plates had been delivered to Calvert & Co. and paid for by them, Calvert & Co. were desirous of [*533 *paying for future supplies by bills instead of cash; and it was ultimately agreed that the plaintiff should draw upon Calvert & Co. for the amount of each invoice, adding 3 per cent., which the plaintiff alleged he would lose by the non-fulfilment of the original contract.

On the 17th of December, 1861, the plaintiff drew a bill at one month upon Calvert & Co. for 254*l.* 3*s.* 1*d.*, being the amount of two invoices, with the additional 3 per cent. Calvert & Co. accepted and returned the bill to the plaintiff. The plaintiff expressing some doubt as to the prospect of its being honoured at maturity, the defendant (not knowing at the time of the arrangement between the plaintiff and Calvert & Co. as to the additional 3 per cent.) agreed to give the plaintiff a check for the amount of the bill less 3 per cent., and to take the bill from the plaintiff *without recourse*: but, inasmuch as a bill endorsed "*sans recours*" would not be marketable, it was agreed that instead of that limited endorsement, the defendant should give the plaintiff an indemnity, which was done in the terms following:—

"R. Mallett, Esq. In consideration of 3*l.* per cent. upon the amount of Messrs. Calvert & Co's acceptance dated the 17th of December, 1861, at one month, for 254*l.* 3*s.* 1*d.*, bought by us this day, and which at our request you have simply endorsed, omitting the words "*sans recours*," we hereby guarantee to hold you harmless as against all liability upon such bill either to ourselves or to any third party.

"19th December, 1861."

"BATEMAN & Co."

The defendant at the same time told the plaintiff, that, if he again drew upon Calvert & Co. for the amount of any future invoices, and brought the bills to him, he would take them upon the same terms.

*534] On the 3d of January, 1862, the plaintiff sent *Calvert & Co. an invoice for buckled plates amounting to 586*l.* 3*s.* 2*d.* (stated to have been delivered at the Darlestone Railway Station on the 1st). With this invoice the plaintiff wrote to Calvert & Co., enclosing a bill drawn upon them for 603*l.* 14*s.* 10*d.*, the amount of the invoice, with the additional 3 per cent., which bill was returned accepted by Calvert & Co. on the 4th; and the plaintiff wrote to them on the 6th, acknowledging its receipt.

On the 20th of January, Calvert & Co. stopped payment, and circulars addressed to their creditors announcing this fact were issued on the 21st, one of which reached the counting-house of the plaintiff on the same day. The stoppage of Calvert & Co. was also announced in the "City article" of the Times on that day. In the afternoon of the 22d the plaintiff called upon Bateman with the last-mentioned bill, and demanded a check for the amount less 3 per cent., as per agreement. The defendant refused to take the bill, alleging that the plaintiff had brought it too late.

On the part of the defendant it was submitted that the plaintiff was bound to have tendered the bill to him within a reasonable time after he received it, and that the delay from the 6th until the 22d of January, when Calvert & Co.'s stoppage had become notorious, was unreasonable and an unwarrantable alteration of the defendant's position; and reliance was placed upon an entry which appeared in the plaintiff's diary of the 22d, to the following effect,—*"Received notice of Calvert & Co.'s suspension of payment. Went to Bateman with Calvert & Co.'s bill, and requested him to cash it, which he refused to do:"* and it was suggested that the plaintiff's intention manifestly was, to keep the bill, and so take to himself the additional 3 per cent., and that he was only induced to alter his mind when he found that Calvert & Co. had failed.

*535] *The plaintiff's mode of accounting for the delay was this. He said he received the bill on the 6th, and called at the defendant's counting-house with it at about 5 o'clock in the afternoon of the 7th, but found no one there; that, on the 9th, he received a letter which called him to Ireland, *whither he went on the 16th*: that he returned to London about mid-day on the 21st, and went to his residence at Clapham, and thence to his office in Parliament Street, where he transacted a little business; that he went to the defendant with the bill as early as he could on the 22d; *and that he did not see the letter giving him notice of Calvert & Co.'s stoppage until after he had seen the defendant.* He accounted for the order in which the events appeared in his diary, by saying that it was his practice to enter at the end of each day the transactions of the day, without regard to the order of time in which they occurred: and he positively swore that he had always intended to avail himself of the defendant's agreement to take the bill on the terms mentioned.

It was also objected on the part of the defendant that the contract relied upon by the plaintiff was a contract to answer for the debt or default of another, and void by the 4th section of the Statute of Frauds, for want of writing.

On the part of the plaintiff it was insisted that the plates were

really sold upon the credit of Bateman, and not upon that of Calvert & Co.

The Lord Chief Justice reserved the defendant leave to move upon this point: and he told the jury that the contract declared upon in the first count might be a perfectly binding contract on the part of the defendant, although the plaintiff did not bind himself to take the bills to him for discount, but reserved to himself the option of doing so or not. He then observed upon the delay which had taken place in offering the bill in *question to the defendant, and the plaintiff's explanation: and he told the jury, that, if they were [*536 of opinion that the plaintiff intended to keep the bill, and so save to himself the 3 per cent., and only resorted to the defendant when he found that Calvert and Co. were likely to become bankrupt, then beyond all doubt they must find the second issue for the defendant; but that, if they were of opinion that the plaintiff really intended to avail himself of the defendant's promise to purchase the bill for the allowance of 3 per cent., and, having missed seeing him on the 7th, was delayed partly by his journey to Ireland and partly by other causes, then their verdict upon that issue must be for the plaintiff. He also told them that the failure of Calvert & Co. was an incident which could not legitimately have any influence upon the question as to what was a reasonable time for the plaintiff to exercise his option. And, as to the count for goods sold and delivered, he thought there was no evidence that the defendant was the purchaser of the goods. Two questions were ultimately left to the jury,—first, was there such a contract as that stated in the first count of the declaration?—secondly, was the plaintiff ready and willing to allow the defendant the 3 per cent.? And his Lordship observed that he had anticipated that there would have been a plea that the bill was not brought within a reasonable time, and he should reserve leave to amend, if necessary, and therefore he would ask them whether the bill was brought within a reasonable time.

The jury answered the first and second questions in the affirmative; and they found that the offer of the bill to the defendant was made in a reasonable time under the circumstances: and they accordingly returned a verdict for the plaintiff on the first and second issues, and for the defendant on the third,—the damages being taken at 586*l.* 3*s.* 2*d.*

**Sir George Honynman*, in Hilary Term last, obtained a rule [*537 nisi to enter a verdict for the defendant pursuant to the leave reserved to him, on the ground that the contract should have been in writing, to satisfy the Statute of Frauds, and also on the ground that the evidence did not support the verdict for the plaintiff; or for a new trial, on the ground that the verdict was against the evidence on the second issue.

Coleridge, Q. C., was instructed to move for a new trial, on the ground that the verdict on the third issue was not warranted by the evidence. Leave was reserved to him to move hereafter if necessary.

Coleridge, Q. C., and *Prentice*, now showed cause.—This was not a contract or promise to answer for the debt, default, or miscarriage of another, within the Statute of Frauds: it was in effect a contract for the purchase by the defendant of an interest in the bill. The defend-

ant says, if you, the plaintiff, will deliver certain plates to Calvert & Co., and take their acceptance at one month, I will discount the bill for 3 per cent. [BYLES, J.—It raises the question whether an agreement to indemnify is within the statute,—as to which the decisions are not easily reconcilable.] There are two cases which are always cited upon this subject, viz. *Houlditch v. Milne*, 3 Esp. N. P. C. 86, and *Castling v. Aubert*, 2 East 325. In the former it was held, that, if a tradesman having goods in his possession, upon which he has a lien, parts with those goods on the promise of a third person to pay the demand, such promise is not within the statute. “In general cases,” said Lord Eldon, “to make a person liable for goods delivered to another, there must be either an original undertaking by him, or [it must appear] that the credit was given solely to him, or there *538] must be a note *in writing. There may, however, be cases to which this rule does not apply. If a person get goods into his possession on which the landlord has a right to distrain for rent, and he promises to pay the rent, though it was clearly the debt of another, yet a note in writing is not necessary. That appears to apply precisely to the present case. The plaintiffs had to a certain extent a lien upon the carriages, which they parted with on the defendant’s promise to pay. That, I think, takes the case out of the statute, and makes the defendant liable for the amount of the bill.” In *Castling v. Aubert*, the plaintiff, a broker, having a lien on certain policies of insurance effected for his principal, for whom he had given his acceptances, the defendant promised that he would provide for the payment of those acceptances as they became due, upon the plaintiff’s giving up to him such policies, in order that he might collect for the principal the money due thereon from the underwriters; which was accordingly done, and the money was afterwards received by the defendant. It was held that this was not a promise for the debt or default of another within the statute, and that the plaintiff might recover against the defendant as well for the breach of agreement in not providing for the payment of the acceptances, as also upon a count for money had and received. Whatever may be said about *Houlditch v. Milne*, *Castling v. Aubert* has never been questioned. In *Fitzgerald v. Dressler*, 7 C. B. N. S. 374 (E. C. L. R. vol. 97), A., through the agency of B., a broker, sold a parcel of linseed to C., who, through another broker, sold at an advanced price to D. The time for D. to pay the price was to arrive before that fixed for the payment by C. D. sent a clerk to the broker for the delivery order for the seed. The broker took him to A., from whom the clerk obtained the order, upon the faith of his engagement that D. would *539] pay A. for the *seed. D. on the following day sent the broker a check for 900*l.* on account,—the precise quantity not having then been ascertained. Upon the seed being afterwards measured, it was found that the amount payable to A. under his contract with C. was 971*l.* 15*s.* 6*d.* In an action by A. against D. to recover the difference between that sum and the 900*l.* check, it was held that the agreement by D.’s clerk was not a contract or promise to pay the debt of a third person, within the 4th section of the statute, the seed the giving up the delivery order for which was the consideration for that promise being the property of D., subject only to A.’s lien for the

contract-price. Williams, J., there says: "At the time the promise was made, the defendant was substantially the owner of the seed in question, which was subject to the lien of the original vendors for the contract-price. The effect of the promise was neither more nor less than this, to get rid of the encumbrance, or, in other words, to buy off the plaintiff's lien. That being so, it seems to me that the authorities clearly establish that such a case is not within the statute." [ERLE, C. J.—The substance of the transaction is this,—Bateman says to Mallett, "If you will deliver the plates to Calvert & Co., I will see you paid." Does the intervention of the bill alter the case, so as to take it out of the statute?] It is submitted that the contract between these parties was for the purchase of the bills at a given price. [WILLES, J.—The transaction being completed, Mallett never could have called upon Calvert & Co. again.] Certainly not. The original debt was gone. In *Goodman v. Chase*, 1 B. & Ald. 297, it was held, that, where a defendant, taken on a ca. sa., is discharged out of custody by consent of the plaintiff, the debt itself is extinguished; and therefore a promise by a third person to pay that debt in consideration of that discharge, is an original promise, and not *within the statute.(a) Several authorities are referred to in Addison on Contracts, p. 56, to show that a contract or promise, although made concerning the debt or default of a third party, may yet be an original contract not within the Statute of Frauds. As to the 3 per cent., it was distinctly left to the jury to say whether or not Mallett was ready and willing to allow the discount; and the jury found that in the affirmative. [WILLES, J.—The contention on the part of the defendant was, that Mallett was not ready and willing to allow the 3 per cent. off the proper price of the iron.] The right amount was drawn for. The defendant had nothing to do with the arrangement between Mallett and Calvert & Co. for the additional 3 per cent. for the month's credit. [ERLE, C. J.—My notion was, that there should have been a plea of fraud, in order to raise that question.] There was no fraud: it was a mere bargain which it was perfectly competent and fair for Mallett to make.

Lush, Q. C., and *Sir George Honynman*, in support of the rule.—What was the alleged contract? The defendant's undertaking was neither more nor less than this,—If you (the plaintiff) will sell plates to Calvert & Co. at a month's credit, instead of requiring immediate payment, and if you draw upon them for the *amount of each invoice, and bring their acceptance to me, I will purchase the bill for an allowance of 3 per cent.: and this is an arrangement which the defendant never would have entered into if he had known that the plaintiff had, in consideration of the month's credit, imposed upon Calvert & Co. the addition of 3 per cent. to the invoice price. It was a fraud upon the defendant. It was optional with the plaintiff to bring the bill or not; but, if he elected to bring it, of course that was to be

(a) And see *Reader v. Kingham*, 13 C. B. N. S. 344 (E. C. L. R. vol. 106). There, the plaintiff, the bailiff of a county-court, being about to arrest one H. under a warrant of contempt for non-payment of a judgment-debt, the defendant, in consideration that he would forbear to execute the warrant, promised to pay the plaintiff 17*l.* on a given day, or surrender H. It was held that this was not an agreement by the defendant to be answerable for the debt or default of H., but an original promise by the defendant to pay the money or surrender H., for which a note in writing was not required by the Statute of Frauds.

done within a reasonable time. The special count assumes that there was a special contract with respect to this particular bill. That, however, was not so. If the plaintiff had stated in his declaration the true legal effect of the contract as proved, he would have averred that he brought the bill within a reasonable time, and demanded cash for it, less the 3 per cent. It was not competent to him to wait until the position of the defendant was altered by Calvert & Co.'s failure. If he had had the bill in due time, he might possibly have got security from Calvert & Co. The plaintiff's intention evidently was to keep the bill, provided Calvert & Co. remained solvent, and so save the discount. [WILLES, J.—The jury have decided that against you.] It is submitted, the jury were not warranted upon the evidence in finding that the plaintiff was ready and willing to allow the 3 per cent. upon the invoice price of the goods, or that the bill was tendered to the defendant within a reasonable time. The case is clearly within the words and the spirit of the Statute of Frauds. It was an engagement by the defendant for a certain consideration to pay Calvert & Co.'s debt. Suppose there had been no bill, but the contract had been, "Bring me the invoice of the goods you may supply to Calvert & Co., and I will pay the amount on your allowing me 3 per cent.," could *542] there have been any *doubt that that would have been within the statute? And does the intervention of the machinery of a bill alter the character of the transaction, and make it less a promise to answer for the debt or default of another? *Williams v. Leper*, 3 Burr. 1886, and that class of cases, where a lien upon goods was given up, have no bearing on this. That was a contract creating a debt for which the third party was not liable at all. Here, the debt from Calvert & Co. to Mallett was not discharged. *Houlditch v. Milne*, 3 Esp. N. P. C. 86, has been much reflected upon in the note (l) to *Forth v. Staunton*, 1 Wms. Saund. 211 e, where the learned editor says: "There is considerable difficulty in the subject, occasioned perhaps by unguarded expressions in the reports of the different cases: but the fair result seems to be, that the question whether each particular case comes within this clause of the statute or not, depends not on the consideration for the promise, but on the fact of the original party remaining liable, *coupled with the absence of any liability on the part of the defendant, or his property, except such as arises from his express promise.*" *Castling v. Aubert*, 2 East 325, and *Fitzgerald v. Dressler*, 7 C. B. N. S. 374 (E. C. L. R. vol. 97), are altogether based upon a different principle. The cases on this subject, and amongst others the judgment of Parke, B., in *Coutourier v. Hastie*, 8 Exch. 40, (a) are ably commented upon in the 12th edition of Selwyn's *Nisi Prius*, Vol. 2, p. 840 et seq.: and at p. 847, the general principle to be deduced from them is laid down as follows:—"From the reasoning in the above judgment may be deduced the true limits to an opinion which appears at one time to have prevailed, that a contract, if founded *543] on a new consideration, is not within the *statute. Now, it is plain that a promise to pay the debt of another founded on the antecedent debt alone, is nudum pactum; and therefore, wherever such contract is to answer for an old debt, there must be a new con-

(a) In the House of Lords, 5 House of Lords Cases 673. The question, however, affecting the liability of the defendants did not go to error.

sideration. It may, perhaps, therefore, be safely laid down, that, whenever the principal object of the transaction is to secure the debt of another, as in the case of an advance to A. on the guarantee of B., the case will be within the statute; and that the only cases in which the nature of the consideration is material are such as those in the class above mentioned, in which the guarantee is only a secondary matter." The object here was to protect the plaintiff from the loss of the debt due to him from Calvert & Co.

ERLE, C. J.—I am of opinion that this rule must be made absolute to enter a verdict for the defendant upon the second issue, on the ground that the contract declared upon in the first count was one which by the Statute of Frauds was required to be in writing. This was a promise by Bateman to be answerable for the debt of Calvert & Co. The original contract was, that Calvert & Co. were to pay for the buckled plates in cash on delivery. Calvert & Co. becoming embarrassed, they wished to have them delivered upon credit, and proposed to pay for future supplies by their acceptances with the endorsement of a third person at York. Some goods having been delivered and drawn for at a month, the defendant, who had an interest in having Calvert & Co.'s contract with Brassey & Co. carried out promptly, in order to induce the plaintiff to continue the supply, agreed to take the bill, without recourse to the plaintiff (the drawer), upon the latter giving him a commission or discount of 3 per cent.; and also orally agreed to do the like with all future bills drawn by him upon Calvert & Co. on the *same account. The substance of that arrangement, as it seems to me, was,—If you, Mallett, [*544 will deliver the goods to Calvert & Co., I, Bateman, will pay you at the rate of 97% for every 100% worth which you so supply. In other words, I will take upon myself to pay Calvert & Co.'s debt, for a commission or allowance of 3 per cent.,—as you hesitate to trust them, I will become their surety. Bateman had no desire to get the acceptances of Calvert & Co. to take into the market: the bill was only the machinery by which the arrangement was carried out. If the plaintiff took Calvert & Co.'s bill, the defendant contracted to take it upon the terms mentioned, and to indemnify the plaintiff against all liability on it. It is in reality a verbal contract to pay the bill. Upon the principle laid down in the cases cited on behalf of the defendant, I am clearly of opinion that this was a contract which by the Statute of Frauds should have been in writing.

WILLES, J.—I am of the same opinion. This was clearly a contract or promise to answer for the debt of another. If the transaction had been carried through, it would have resulted in the payment by Bateman of Calvert & Co.'s debt. Bateman clearly contracted to take upon himself the liability to perform Calvert & Co.'s engagement,—to answer for their debt or default. All Bateman was to get for that was 3 per cent. It is true he was to get the bill. But that was only part of the machinery by which the contract was to be carried out. The case of a *del credere* agent is altogether distinguishable, and affords a good illustration of the present case, besides the authority of Baron Parke's judgment in *Coutourier v. Hastie*, 8 Exch. 40, that this case is within the Statute of Frauds.

*545] *BYLES, J., concurred.
KEATING, J., was sitting in the Court of Criminal Appeal.
Rule absolute.(a)

(a) To enter the verdict for the defendant, on the ground that the contract should have been in writing to satisfy the Statute of Frauds: leave being reserved to the plaintiff to move for a new trial, on the ground that the verdict was against evidence on the third issue, after the appeal against this judgment should have been disposed of.

END OF EASTER TERM.

***IN THE EXCHEQUER CHAMBER. [*546**

EASTER VACATION, 1864.

BROWNLOW and Others v. THE METROPOLITAN BOARD OF WORKS and AIRD. May 12.

Held,—affirming the judgment of the court below, 13 C. B. N. S. 768,—that the metropolitan board of works have no power under the 135th section of the Metropolis Local Management Act, 18 & 19 Vict. c. 120, to erect any works on the bed or soil of the Thames, without first obtaining the consent of the Admiralty, pursuant to the 27th section of the Main Drainage Act, 21 & 22 Vict. c. 104, and of the conservators of the river, pursuant to s. 28: and that consequently they were liable to an action at the suit of the owner of a vessel which sustained damage from grounding upon a pile negligently placed on the foreshore by a contractor employed by them.

THIS was an appeal against a decision of the Court of Common Pleas.

The following are the facts as agreed on between the parties:—

1. The plaintiffs were the owners of a screw steamer named the Zebra, of the burthen of 426 tons, which vessel, on the 30th of December, 1860, was proceeding, under charge of a pilot, with a cargo on board, down the river Thames, on a voyage to Malta, Corfu, and other ports in the Mediterranean.

2. In the course of her passage down, the vessel, in attempting to pass to the southward of a tier of vessels moored in the said river, ran against a buoy, and the steering apparatus of the Zebra was thereby disabled, whereby she became unmanageable; and she in consequence ran on shore, taking the ground forward.

3. After the vessel had so run on shore, she swung round with the tide, and it was discovered that she was making water; and upon examination, upon the tide falling, it was found that certain piles which formed part of certain works constructed by the defendants, the metropolitan board of works, by their contractor, the defendant Aird, and which works were so constructed upon the bed of the river Thames below low-water mark, had run into and through the vessel's bottom. If the said piles had not been there, *the ship would [*547 at the fall of the tide have grounded on the mud in the bed of the river, and floated again on the rise of the tide, without receiving any injury.

4. For the damage thus occasioned to the plaintiff's vessel this action was brought.

5. The works of which the said pile formed part were commenced by the defendants after the 28th of March, 1860: and the nature of these appeared by the contract of that date between the metropolitan board of works and the defendant Aird, pursuant to which the same were executed. [A copy of the contract accompanied and was to be taken as part of the case.]

6. The existing sewer mentioned in the contract is the "Earl Sewer," being one of the sewers mentioned in Schedule D. of the Metropolis Local Management Act, 18 & 19 Vict. c. 120; and is by the 135th section of that act vested in the metropolitan board of works.

7. Before the works of the defendants above referred to, the Earl Sewer discharged itself into the Thames, at high-water, and upon the bed or shore of the river when the tide had fallen.

8. The ultimate object of the defendants' works, was, to discharge the surplus water from the Earl Sewer into the river at low-water: but, until the completion of the main drainage system, it was intended to serve to discharge the sewerage from the Earl Sewer into the river below low-water mark.

9. The works were designed and executed in accordance with the contract.

10. There are other outlets of sewers running into the Thames similar to the outlet of the Earl Sewer.

11. Previously to the commencement of the said works, the said works had not been approved of by the Lord High Admiral or the commissioners for executing the office of Lord High Admiral; nor have such works been so approved of at all.

*548] 12. A great deal of evidence was given on both *sides not material to the questions before the court of appeal; and, among other evidence, it was proved that the defendants' works did interfere with the navigation of the river.

13. The learned judge left the following questions to the jury:—

First, "Was the pilot guilty of want of ordinary skill or want of ordinary prudence or care in doing what he did?"

Secondly, "Did the works of the defendant interfere with the navigation of the river Thames?"

Thirdly, "Were the piles cut off level with the shore?"

Fourthly, "Was there any neglect of duty on the part of the defendants, in not giving notice, by a barge(a) or flag, of the existence of the works?"

Fifthly, "Were the leading piles driven in above or below low-water mark, with reference to the plans submitted to the conservators of the Thames?"

14. To these questions the jury returned the following answers:—

First, "The pilot was not guilty of any want of skill or care.

Secondly, "The works did interfere with the navigation.

Thirdly, "The piles projected from the shore at one end.

Fourthly, "Precautions ought to have been taken; but the jury are unable to say by whom.

Fifthly, "Three of the leading piles were above low-water mark, that is, nearer the shore than the line of low-water mark given by the Admiralty, and one pile below low-water mark."

15. Upon these answers, the learned judge directed a verdict to be entered for the plaintiffs, reserving leave to the defendants to move to enter it for them upon both or either of the counts in the declaration.

*549] 16. In Michaelmas Term, 1861, the metropolitan *board and the defendant Aird respectively moved the court in pursuance of the leave reserved.(b) Rules nisi were granted, and after-

(a) Buoy.

(b) The grounds stated in the rule obtained by the board were as follows:—"1. That the defendants were a public body acting gratuitously, and exercised due care and skill in and about the works complained of: 2. That the act or acts complained of were the act or acts of the contractor employed by the defendants: 3. That the defendants were justified in doing the

wards discharged by the rule now appealed against; the plaintiffs consenting that the verdict should be entered for the defendants on the second count. See the report, 13 C. B. N. S. 768 (E. C. L. R. vol. 106).

The question for the opinion of the court of appeal was, whether the said rules nisi respectively ought to have been discharged or ought to have been made absolute.

The case was argued in the Exchequer Chamber before Bramwell, B., Channell, B., Blackburn, J., Mellor, J., Pigott, B., and Shee, J.

The Attorney-General* (with whom were *Denman*, Q. C., and [550* *Raymond*]), for the board of works.(a)—The principal points argued in the court below were, that no wrongful works were authorized by the board to be erected, and that no wrong was done. The court thought that the works were unauthorized, the consent of the Admiralty not having been obtained, and that the defendants were guilty of the wrong charged. The decision here will turn mainly upon the construction of some sections of the Metropolis Local Management Act, 18 & 19 Vict. c. 120, and of the Main Drainage Act, 21 & 22 Vict. c. 104: and upon these two questions will arise,—first, whether the first act authorized the board to construct sewer works on the bed or foreshore of the Thames,—secondly, whether the second act required the consent of the Admiralty to be obtained as a condition precedent, in the absence of which the works would be *ultra vires*. The first point was not decided in the court below, though Erle, C. J., intimated an opinion in the negative. The decision turned upon the second point. On the part of the appellants, it will be submitted,—first, that the board had power under the 18 & 19 Vict. c. 120, to do the works in question,—secondly, that this power is not affected to their disadvantage by any of the provisions of the 21 & 22 Vict. c. 104,—thirdly, that the board, as a corporation created for public purposes and dealing with public funds, could not be made responsible personally, and could not do anything to charge those funds. [BRAMWELL, B.—This last point was not taken either at the trial or upon the argument in the court below.]

*1. The 18 & 19 Vict. c. 120 recites that “it is expedient [**551* that provision should be made for the better local management of the metropolis in respect of the sewerage and drainage,” &c. The earlier sections assign certain functions to vestries and district boards,

acts complained of under the Metropolis Local Management Act (18 & 19 Vict. c. 120), and the Main Drainage Act (21 & 22 Vict. c. 104), or one of them: 4. That the injury complained of did not result from the alleged improper acts of the defendants.”

Aird's rule was, to enter a verdict for him, or a nonsuit, or for a new trial, on the ground that the works were lawful under the acts of parliament, for the reasons relied upon by the other defendants, and stated in the rule obtained by them,—with liberty to the defendant Aird to contend that the findings of the jury on the third and fifth questions left to them, if material, were against the weight of evidence; or why the verdict against Aird on the second count of the declaration should not be set aside, and instead thereof a verdict be entered for him, or a new trial had, on the grounds,—first, that there was no such negligence as alleged,—secondly, that, if there was, it was not the cause of the accident, and that the defendant Aird was not responsible, being merely a servant of the other defendants, and acting under and in accordance with their instructions,—thirdly, that the verdict was against evidence.

(a) The only point marked for argument on the part of the board was,—“That the act or acts complained of were justified by the Metropolis Local Management Act, 1855, and the Main Drainage Act, or one of them.”

vesting in them the parish sewers, and the main sewers of the metropolis in the general board, whose powers with respect to them are defined and regulated by the 135th and some subsequent sections. The 135th section empowers the board to "make such sewers and works as they may think necessary for preventing all or any part of the sewerage within the metropolis from flowing or passing into the river Thames in or near the metropolis," and "to make such other sewers and works and such diversions or alterations of any existing sewers or works vested in them under this act, as they may from time to time think necessary for the effectual sewerage and drainage of the metropolis," and from time to time to repair and maintain the sewers so vested in them: and then it goes on to provide that, "for the purposes aforesaid, such board shall have full power and authority to carry any such sewers or works through, across, or under any turnpike-road, or any street, or place laid out as or intended for a street, as well beyond as within the limits of the metropolis, or through or under any cellar or vault under the carriage-way or pavement of any street, and into, through, or under *any lands whatsoever* within or beyond the said limits, making compensation for any damage done thereby," &c. It is material to observe that all the sewers, and all the duties, powers, and authorities of the metropolitan commissioners of sewers with regard thereto, are vested in the metropolitan board of works, and all the powers of the former board have ceased: ss. 145-148. The 151st section contains an incorporation of *the voluntary clauses of the Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18, the interpretation clause (s. 3) of which declares that the word "lands" shall extend to messuages, lands, tenements, and hereditaments of *any tenure*. It is impossible, therefore, successfully to contend that the general words of s. 135 are not sufficient to embrace works on the foreshore of the Thames. The last Sewers Act, 11 & 12 Vict. c. 112, s. 147, the general object of which was to prevent the discharge of offensive matter into the Thames at high-water, contains a similar interpretation clause. In giving his judgment, Erle, C. J., upon this part of the case, says,—13 C. B. N. S. 786 (E. C. L. R. vol. 106),—"If it were necessary, I should come to the conclusion that the legislature did not intend to give power to the metropolitan board to carry their works into the river Thames so as in any degree to obstruct the free navigation thereof. It is not necessary, however, for the judgment I am about to pronounce that I should offer any opinion upon that; but I cannot help observing that the legislature, having in s. 135 specified several places through, across, or under which the board may carry their works, have cautiously abstained from mentioning the bed or soil of the river." That, it is submitted, is not a legitimate mode of interpreting general words used in an act of parliament. [BLACKBURN, J.—The Chief Justice is dealing with the interference with the public navigation.] The earliest general sewers act, 23 H. 3, c. 5, gives the form of the commission, and s. 3 empowered the commissioners to repair all sea-walls, sewers, &c. The 7th section empowered them to make orders, &c.: and s. 9 enacted that "the same laws, ordinances, and decrees to be made and ordained by the said commissioners or any six of them, by authority of the said commission, should bind as well the lands, tenements, and

*hereditaments of the King our sovereign lord, as all and every other person and persons, and their heirs, for such their interest as they should fortune to have or might have in any lands, tenements, or hereditaments, or other casual profit, advantage, or commodity whatsoever they be, whereunto the said laws, ordinances, and decrees should in any wise extend, according to the true purport, meaning, and intent of the same laws." In *Callis on Sewers*, p. 99, is an order in council touching the extent of the authority of the commissioners; and in the case of the vills of Newton and Tyd, *Styles* 192, their powers are defined. The statute of H. 8 is explained and amended by the 3 Jac. 1, c. 14, the 2d section of which enacted "that the walls, ditches, banks, gutters, sewers, gates, cawseys, bridges, streams, and watercourses within the limits of two miles of and from the city of London, which waters have their course and fall into the river of Thames, shall from henceforth be to all intents, constructions, and purposes, as fully subject to the commissioners of sewers, and to all the statutes made for sewers, and to all penalties in the same statutes and in every of them contained, as if the same places near to the said city of London had been particularly named in the said statute of sewers, or that therein the water had ebbed and flowed, and therein free passage with boats and barges to the sea had been heretofore used; anything in the said statutes or elsewhere to the contrary in any wise notwithstanding." The 47 G. 3, c. 7 (local and personal), empowered the commissioners to deepen, widen, and alter the then existing sewers, and to make new ones, &c. Further powers for the same purpose were given by the 10 & 11 Vict. c. lxx, s. 8: and the interpretation clause, s. 35, declared that the word "person" or "persons" should be deemed to include "the Queen's most excellent Majesty, a body politic, *corporate, or collegiate, corporations aggregate or sole," &c.; and that "lands and tenements" should include [*554 "all lands, gardens, nursery-grounds, buildings, and every species of hereditaments, corporeal or incorporeal, and whether freehold or of any other tenure." The 36th section enacted that "nothing in that act contained should extend or be construed to extend to invalidate or interfere with the rights, powers, and authorities of Her Majesty, or the commissioners of woods and forests, or to the taking away, abridging, or impeaching in any manner whatsoever the jurisdiction of the High Court of Admiralty." And s. 37 was a saving of the rights of the mayor and corporation of London. Then came the 11 & 12 Vict. c. 112, which consolidated all the powers and authorities of the commissioners of sewers, except as to the city of London. The 1st section empowered the Crown to issue one commission of sewers within certain limits, and provided that "no place or part comprised within such limits should be exempt from the jurisdiction of the commissioners by reason of the same being extra-parochial, or being beyond the ebb or flow of the tide, or by reason of any other exemption or supposed exemption from the general law of sewers previously to the passing of that act." The 37th section enacted that all sewers, drains, &c., within the limits of the commission, should be "subject to the survey, order, and control of the commissioners, according to the provisions and subject to the regulations and restrictions of the act: and s. 38 empowered the commissioners to repair all sewers vested in them,

and from time to time to construct new ones, &c. When we find the legislature putting an end to the old commissions, and vesting in the metropolitan board of works all the property and all the powers and authorities which the old commissioners possessed, by an act *555] which professes to have been framed for the *better* management of the metropolis in respect of drainage, it is but reasonable to give to the large words of the 135th section at least as extensive a signification as those of the old statutes received. It is obvious that the powers of the new body were not intended to be less than those before exercised by the old one. [BLACKBURN, J.—Do any of the earlier acts give the commissioners power *permanently* to interfere with the navigation of the Thames, or contain any clause authorizing them to do anything which might permanently interfere with public rights of way either on water or upon land?] Not in terms. The words in all of them are general. No *permanent* obstruction of the navigation was intended here.

2. Then, do the provisions of the Main Drainage Act, 21 & 22 Vict. c. 104, in any way abridge or curtail the powers of the board? The fallacy of the argument and of the judgment in the court below lies in the assumption that the 21 & 22 Vict. c. 104, was to guide the construction of the Metropolis Local Management Act. The words of the 27th section of the statute, upon which that argument was founded, are,—“No works upon the bed or shores of the river Thames below high-water mark which may interfere with the navigation of that river shall at any time be commenced or executed under *the provisions of this act*, without the same having been previously approved of by the Lord High Admiral, or the commissioners for executing the office of Lord High Admiral, such approval to be from time to time specified(a) in writing under the hand of the secretary to the admiralty.” The last clause, s. 33, which declares that “the said act of the 18 & 19 of Her Majesty and this act shall be read together as one act,” means that the two acts are to be read as if all the clauses *556] of both had been contained in one act,—not that, by reason of the provisions in the second act, those of the first act are to receive a non-natural construction. The words in s. 27, “the provisions of this act,” do not mean “the provisions of this act and of the 18 & 19 Vict. c. 120.” The works referred to in the second act have no reference to the general works authorized to be executed under the earlier act; but merely to those authorized by s. 2, which enacts that “the metropolitan board of works, *for the purposes of this act*, may construct any work through, along, over, or under the bed and soil and banks and shores of the river Thames, making compensation to all persons having any interest in any wharfs, jetties, or other property damaged by such works, as provided by the said act of the 18 & 19 Vict. in respect of property injured under the powers of such act.” As to this, Willes, J., in the court below, says,—p. 790,—“The proper way of dealing with this question, is, to put the two acts,—18 & 19 Vict. c. 120, and 21 & 22 Vict. c. 104,—together, and to treat the 135th section of the former as if it were found in an act of which the 2d section of the latter formed one of the sections. There would then be a general clause giving the board power to con-

struct their works in all places within the limits of the metropolis, and then a special clause dealing with works to be done in the bed or soil of the river Thames: and, of course, in considering what are the powers conferred upon the board with respect to works to be done in the bed of the river, regard must be had to the special clause only; and not to the general provision. Now, the powers conferred by the special clause, the 2d section of the 21 & 22 Vict. c. 104, are to be exercised only subject to the condition contained in the 27th section of the same act, viz. that they shall be previously approved of by the Lord High Admiral or the *commissioners of the admiralty. [*557 As that condition was not complied with here, it stands that the board of works have placed an unauthorized obstruction in a public navigable river, which is a public nuisance, and consequently that they are liable to the plaintiffs for the particular damage which they were proved to have sustained thereby." It is submitted that this is not a correct mode of expounding an act of parliament. If the last act had been intended to control the general powers given by the 135th section of the 18 & 19 Vict. c. 120, the legislature would have said so in unequivocal language. The preamble and all the earlier sections of the 20 & 21 Vict. c. 104, show that its provisions were intended to be confined to the works contemplated by that act, viz. the main drainage scheme. The powers of taking land under s. 3, of raising and securing money under ss. 4, 5, 6, 7, 8, of appointing an engineer (by the treasury) under s. 9, and of making and levying rates under ss. 10 and 11, are all expressly limited to "works under this act:" and it is to these works only that the consent of the admiralty is required. A separate account is to be kept at the Bank of England "for the purposes of this act." All these provisions show that this act intended to deal with an entirely separate thing from the former. [BRAMWELL, B.—Are the works now in question part of the main drainage scheme?] The case states, in paragraph 8, that "the ultimate object of the defendants' works was, to discharge the *surplus water* from the Earl Sewer into the river at low-water: but, until the completion of the main-drainage system, it was intended to serve to discharge the *sewerage* from the Earl Sewer into the river below low-water mark." The Thames Conservancy Act, 1857 (20 & 21 Vict. c. cxlvii.), assumes that the powers here claimed were vested in the commissioners of sewers. The 166th *section enacts that "nothing [*558 in this act contained shall extend to prejudice, diminish, alter, or take away any of the rights, powers, or authorities with respect to the regulation of sewers vested in the commissioners of sewers within the limits of this act, or in any person under or by virtue of any act of parliament, or to render any person liable to any penalty under this act for allowing ordinary sewage to flow into the river Thames, but all such rights, powers, and authorities vested in such commissioners or person shall be as good, valid, and effectual as if this act had not been passed." And s. 167 enacts that "nothing in this act contained shall extend to prejudice, diminish, alter, or take away any of the rights or powers vested in the metropolitan board of works with reference to the construction and maintenance of sewers and any other works for the sewerage, drainage, or improvement of the metropoli." [BRAMWELL B.—Is there any provision in the Metropolis

Local Management Act or in the Main Drainage Act for compensation to be paid where rights are interfered with?] The 225th section of the former act provides for the mode of settling claims for compensation similar to that contained in the Lands Clauses Consolidation Act, 1845. [BRAMWELL, B.—That assumes it, but does not answer my inquiry. BLACKBURN, J.—The 135th section enables the board to make sewers, and gives them various powers to carry their works through, across, or under any turnpike-road, &c.: and s. 157 imposes certain regulations as to breaking up turnpike-roads: but I do not find either in this act or in the Lands Clauses Consolidation Act any authority even temporarily to interfere with navigable waters.] The general words of the 135th section, it is submitted, coupled with the whole scheme of legislation upon this subject, abundantly show that the board have the power they have here assumed to exercise.

*559] *3. Then, are the board liable to be sued in this manner? This action is brought against them upon the assumption that the work in question was *ultra vires*; or, in other words, unlawful, unless certain consents have been previously obtained. What is the constitution of the board? They are constituted and incorporated by s. 43, and are to have perpetual succession and a common seal, and are empowered to take, purchase, and hold land for the purposes of the act. Their duties are defined by various sections; and then comes the 135th section, which vests the sewers in them, and gives them very large powers for carrying into effect the important works committed to their charge. The 144th and subsequent sections authorize them to incur large expenditure. Section 170 enables them to make assessments to meet that expenditure. The 180th and following sections provide for existing debts and liabilities, &c. The general result of all these provisions is, that they are a public body, created for public purposes by a public act of parliament, having no property except that which is vested in them for the purposes of the act; and with no power to expend the moneys to be raised by them otherwise than for the purposes of the act. In *Duncan v. Findlater*, 6 Clark & Fin. 894, 906, where it was sought to make the trustees under a turnpike-road act responsible for an injury occasioned by the negligence of the men employed in making or repairing the road, Lord Cottenham, C., says: "Independently of the authorities, let us first inquire what are the merits of the case on the statute under which these trustees act. The learned judge (a) said 'The road-trustees, in forming a road, are liable for any injury which may happen to passengers in consequence of the negligence or improper conduct of labourers or surveyors or other persons employed by the trustees, or by the officers of the *trustees, when engaged in any operation performed
*560] under the authority of the trustees.' If the law thus laid down to the jury is wrong, the verdict which has been given in consequence of it cannot be permitted to stand. The law is stated to be, that the road fund is liable for the misconduct of any person employed by the road trustees. This direction assumes that the act done was an act not within the provisions of the statute, that it was not done in consequence of those provisions; for, otherwise, the direction would be in that respect improper, since whatever is done under the authority

(a) Of the Court of Session in Scotland.

of the statute gives no right of action. If that was not so, the result would be that all the damages, though not arising from any act done by the immediate authority of the road trustees, would be liable to be compensated out of the trust-fund,—a proposition which certainly cannot be supported by the law which regulates the liability of master and servant. It is impossible to suppose that the framers of this statute contemplated that any part of this fund would be appropriated for the purpose of affording compensation for any act of the persons who might be employed under the authority of the trustees. If the thing done is within the statute, it is clear that no compensation can be afforded for any damage sustained thereby, except so far as the statute itself has provided for it: and this is clear on the legal presumption that the act creating the damage, being within the statute, must be a lawful act. On the other hand, if the thing done is not within the statute, either from the party doing it having exceeded the powers conferred on him by the statute, or from the manner in which he has thought fit to perform the work, why should the public fund be liable to make good his private error or misconduct? Cases may possibly be supposed in which the funds raised by a statute would be liable for acts done strictly in pursuance of the directions of that statute, but none in which such funds would be liable for acts done without the authority of the statute." There are cases where public bodies trading corporations for instance, have been held responsible for the negligent acts of persons employed by them: but these have no application to a public body like this. [BLACKBURN, J., referred to *Whitehouse v. Fellowes*, 10 C. B. N. S. 765 (E. C. L. R. vol. 100). MELLOR, J.—*Duncan v. Findlater* contemplates only two classes of cases. *Whitehouse v. Fellowes* shows a third.] In *Whitehouse v. Fellowes*, the commissioners were held to be responsible, on the ground that the work was negligently and unskilfully done. [MELLOR, J.—My Brother Byles explains that in *Holliday v. The Vestry of St. Leonard, Shoreditch*, 11 C. B. N. S. 192 (E. C. L. R. vol. 103).] Here, the board are exonerated from all charge of negligence: the case, therefore, falls within the principle of *Duncan v. Findlater*, and steers clear of the ground upon which *Whitehouse v. Fellowes* was decided. [BRAMWELL, B.—If, as you suggest, this was *ultrà vires*, the board perhaps would not be bound to pay Aird for what he did under his contract.] A deed executed by a railway company under seal in respect of a matter which was *ultrà vires*, was held by the Court of Queen's Bench to be incapable of being enforced: *Gage v. The Newmarket Railway Company*, 18 Q. B. 457 (E. C. L. R. vol. 114). A fortiori the funds of the rate-payers cannot be affected by an assumption by the board of works of a power which they do not possess. [BRAMWELL, B.—This is a very alarming doctrine. Suppose a particular member of the board authorized a thing to be done which turned out to be *ultrà vires*, would he not be personally liable?] These persons have no power of doing either right or wrong except under the statute: and they cannot answer in damages except out of funds which are expressly devoted by parliament exclusively to other purposes.

**Mellish*, Q. C. (with whom was *H. Lloyd*), for the defendant Aird.—Assuming that the consent of the admiralty was neces- [*562

sary, it was not necessary to the validity of Aird's contract with the board. This consent could only be obtained by the board of works. They appeared to have power under the statute to do what they proposed to do; and, if it were a condition precedent to the work being commenced, that the consent of the admiralty should be obtained, it was an implied covenant on their part that they had obtained it; and therefore Aird was justified in supposing that the work might lawfully be done: and it is admitted that what he did was done in accordance with his contract.

Bovill, Q. C. (with whom was *Lush*, Q. C., and *Sir G. Honyman*), contra, was stopped by the court.

BRAMWELL, B.—We are all of opinion that the judgment of the court below should be affirmed. The question is, whether the plaintiff proved the first count of his declaration, which alleges that the defendants wrongfully placed in a certain navigable river, to wit, the Thames, certain piles, and wrongfully kept and continued them there obstructing the navigation, and that the plaintiff's ship, whilst lawfully navigating the river, ran and struck upon the piles, and was damaged. That the defendants did in fact place the piles there, there is no doubt. They were placed there by Aird by virtue of a contract made between him and the board. Therefore it is plain the defendants did the act complained of. The question then arises, whether this was a wrongful act. The first matter which was urged by the Attorney-General on behalf of the board, was, that, independently of any of the provisions of the Metropolis Local Management Act, the *563] board had succeeded to all the rights, duties, *and powers as well as the property of the old commissioners of sewers. Assuming that to be so, we are all clearly of opinion that the old commissioners of sewers had, as incidental to their rights and duties as to repairing and dealing with the sewers and the outlets into the Thames, no right to do that which is here complained of: they could have no right to do that which would be an indictable nuisance. Therefore, assuming the present board to be the successors of the old commissioners, and to be clothed with all their rights, duties, powers, and privileges, that would not enable them to do, or justify them in having done, the act here charged. The Attorney-General next relied upon the particular powers given to the board by the 135th section of the Metropolis Local Management Act, 18 & 19 Vict. c. 120, which he urged was neither modified or abridged by the subsequent act, the Main Drainage Act, 21 & 22 Vict. c. 104. We are, however, of opinion that the 135th section of the Metropolis Local Management Act did not give the board the power here claimed to be exercised by them. The words are remarkable. It is to be observed that the river Thames is mentioned in one part of the clause. The river, therefore, was present to the minds of the legislature when enacting this section. The words of the section, to which it is necessary to refer, after vesting in the board the main sewers before vested in the commissioners of sewers and the materials thereof, and all rights of way and passage used and enjoyed by such commissioners over and to such sewers, works, and things, and all other rights concerning or incident to such sewers, works, and things, proceeds to enact that "such board shall make such sewers and works

as they may think necessary for preventing all or any part of the sewage within the metropolis from flowing or passing into the [*564 "river Thames in or near the metropolis," &c., and shall also make all such other sewers and works, and such diversions or alterations of any existing sewers or works vested in them under this act as they may from time to time think necessary, &c.; "and for the purposes aforesaid such board shall have full power and authority to carry any such sewers or works through, across, or under any turnpike-road, or any street or place laid out as or intended for a street, as well beyond as within the limits of the metropolis, or through or under any cellar or vault under the carriage-way or pavement of any street." &c. Now, that would go very far to show, if it stood alone, that the board were empowered to do that which would be a nuisance in a public way, without qualification or restriction of any kind. Then come the other words upon which the Attorney-General relied,— "and into, through, or under *any lands whatsoever* within or beyond the said limits, making compensation for any damage done thereby as hereinafter provided," &c. I refrain from going into the argument urged for the purpose of showing that "lands" here must be read according to the meaning given to it in the interpretation clause of the Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18, s. 3, to which we do not assent, because it seems to us to be manifest that the incorporation of the provisions of that act by s. 151 have no relation to this clause. But it appears to us that the word "lands," taken in conjunction with the words with which it is associated, must mean private lands for the taking or using of which compensation may be made as thereafter provided. Now, it is a remarkable thing, that what would otherwise be an unqualified and unrestricted power of committing a nuisance by virtue of those general words, is modified and restricted by the 157th section, which shows, that, so far [*565 *from the 135th section conferring any general right to commit a nuisance in a public highway, the right to interfere with it is to be exercised only under the restrictions contained in that section. Taking all these considerations together, it would certainly be a very singular thing, the Thames not being named in s. 135 as a place under which the board may carry a sewer, and express provision being made for restricting their power of interfering with public rights of way when they carry them under turnpike-roads,—it would be a very singular thing indeed if this gave them (as it is contended it did) unlimited and unqualified power to do that which would be a public nuisance in the Thames: and we have come to the conclusion that it does not do so. We are therefore of opinion, that, if these works had been done under the first act of parliament, 18 & 19 Vict. c. 120, still they would be done wrongfully, that is, without authority, and consequently the allegation in the first count of the declaration would be made out.

That being so, we need say but little about the Main Drainage Act, 21 & 22 Vict. c. 104. Whether it would be right to say that the powers conferred by the 18 & 19 Vict. c. 120 are controlled or modified by the provision in the 27th section of the 21 & 22 Vict. c. 104, that no works on the bed or shores of the river Thames below high-water mark which may interfere with the navigation of that river

shall at any time be commenced or executed under the provisions of that act, without the previous approval of the admiralty, it is unnecessary for us to determine; because, being of opinion that it cannot lawfully be done under the first act, and it being conceded that it cannot be done under the second without the prescribed consent, it follows that (no consent having been obtained) it cannot lawfully be done at *566] all. We are therefore of *opinion that the allegation in the declaration that these piles were wrongfully placed and driven into the bed or soil of the river, is made out,—subject to the remaining point, as to which Mr. Mellish and the Attorney-General are opposed to each other. And upon that we are of opinion that the defendants are liable, on this short ground, without going through a long series of authorities which perhaps it is not very easy in an off hand way to reconcile with each other, viz. that the thing done was within the general scope of the authority of the metropolitan board of works; but it was done irregularly. The way to illustrate what we mean by that expression, is this,—Now that the work is done, it cannot be doubted that it is one of the works done by the board in furtherance of the powers confided to them, and that it is vested in them, so that, if any one committed a trespass upon it, they would have a right to sue for that trespass. But there was an irregularity in the mode of doing it. No license or consent of the admiralty was obtained. The result is, that any person who is injured by the thing being done has a right to complain of it: and, though in one sense unlawful, it is still a thing done within the general scope of the authority of the board. The common illustration which strikes one is, the liability of a master for the negligent driving of his servant. As between him and his servant, the master may say, “I did not authorize you to drive negligently:” in one sense, therefore, the servant has been negligent without his master’s authority. But, as against a party injured by the servant’s negligent driving, the servant was acting within the general scope of his authority, and therefore his master is responsible.

Upon these grounds, therefore, we think the judgment of the Court of Common Pleas was right, and must be affirmed.

Judgment affirmed.

*567] *THE SOUTHAMPTON DOCK COMPANY v. HILL.
May 13.

The Southampton Dock Company are empowered by their act 6 W. 4, c. xxix., s. 149, to charge for the landing of goods in their dock, the several sums mentioned in the schedule thereto annexed, and for articles not therein particularized, such sums as shall be equal to the sums affixed on goods, &c., “of a similar nature, package, value, and quality,” in the schedule. All the charges mentioned in the schedule were of small fixed sums,—none being *ad valorem* except the charge for “sculptured marble” and “marble slabs.” At the end was a note,—“Goods not included in the foregoing schedules to be charged in proportion to the rates therein specified, according to size and weight:”—

Held,—affirming the judgment of the court below, 14 C. B. N. S. 243,—that the company were not entitled to make an *ad valorem* charge for the landing of goods not enumerated, or at all approaching, in “nature, value, and quality,” to any of those enumerated in the schedule.

THIS was an appeal from a decision of the Court of Common Pleas.

The plaintiffs are a corporation regulated by the statute 6 W. 4, c. xxix., intituled "An act for making and maintaining a dock or docks at Southampton."

This action was brought for the recovery of charges made by the plaintiffs in respect of the services hereafter mentioned. The particulars of the plaintiffs' demand were as follows:—

"For the import-rate, comprising the landing, wharfage, housing in strong room, opening for examination by the officers of Her Majesty's customs, repacking and soldering, warehouse-rent, and delivering, and for work and labour performed and materials found by the plaintiffs in respect of two cases containing jewellery shipped by G. Wollheim & Co. on board the ship Pera, consigned to the defendant, and landed in the plaintiffs' docks on the 31st of January, 1862, upon the value as declared by the shippers in the bill of lading of the said two cases, as under, viz.

"W. C.	No. 1	value £4600
"P. B.	" 2	" 2600

£7200

"Upon 7000*l.* at the customary rate
of 2*l.* 7*s.* 6*d.* for each 1000*l.* value 16 12 6
Ditto 200*l.* " 0 7 9

"For a tin case cut and re-soldered . 0 1 0

£17 1 3"

*The cause was tried before Willes, J., at the sittings in London after Michaelmas Term, 1862. [*568

At the trial it appeared in evidence that two articles had been consigned to the defendant by the Sultan of Egypt, for the purpose of their being exhibited at the great international exhibition in London. One of these articles was a small mirror, something less than a foot square, framed; the frame of which was of silver, and was set with numerous diamonds, emeralds, pearls, and other precious stones, and was ornamented with a valuable pendent diamond at the top. This mirror was in the bill of lading declared to be of the value of 4600*l.*, and was in fact of that value at the least. The other article was a stereoscope and stand likewise ornamented with precious stones, similar to the mirror, and which was declared in the bill of lading to be of the value of 2600*l.*, and which was of that value at the least.

Each of the articles was imported by the defendant into the plaintiffs' dock at Southampton in a separate case on the 31st of January, 1862, and was on that day unshipped from the Pera and landed by the plaintiffs, and on the same day, in the usual course of business, was loaded on a truck and removed from the quay to the sight or examination floor, and deposited by the plaintiffs in the cage used by them for warehousing precious articles until examined by the officers of Her Majesty's customs, or until delivery, and warehoused there until the following day.

It was necessary that the cases and their contents should be examined by the officers of Her Majesty's customs.

On the following day, at the request of the defendant, both cases were trucked out of the cage, unpacked, and prepared by the plaintiffs to be opened and examined by the officers of Her Majesty's customs.

*569] One *of the cases was opened by the plaintiffs and examined by those officers, who were assisted in such examination by the plaintiffs' servants: and, after such examination, the case was soldered up again by the plaintiffs. The officers did not require the other case to be opened.

Both cases were then repacked by the plaintiffs, at the request of the defendant, and delivered to and taken away by the defendant.

The plaintiffs' charge in respect of these services is the sum of 17*l.* 1*s.* 3*d.*, being at the rate of 2*l.* 7*s.* 6*d.* for each 1000*l.* of value, and 7*s.* 9*d.* on the odd 200*l.* in value, and 1*s.* for resoldering one case.

It was admitted at the trial, on the part of the defendant, for the purpose of this action only, that, if the plaintiffs were entitled to charge an ad valorem rate for the above services, without relation to the provisions of the company's act, the sum sought to be recovered would be a fair and reasonable ad valorem charge.

The plaintiffs did not contend that the defendant had made any agreement, express or implied, with reference to the services charged for in this action to pay at the ad valorem rate for the services charged for in this action.

The defence was, the plaintiffs had no right to charge such ad valorem rate; and that the sum of 40*s.* (which had been paid into court) was sufficient to cover all the plaintiffs were entitled to charge, if they were not entitled to charge such ad valorem rate; and it was admitted by the plaintiffs that such sum was sufficient, unless the plaintiffs were entitled to charge at the ad valorem rate.

The jury, under the direction of the learned judge, found a verdict for the plaintiffs for 15*l.* 1*s.* 3*d.*, being the amount of the plaintiffs' *570] charges, less the sum of *40*s.* paid into court; leave being reserved to the defendant to move to enter a nonsuit or verdict for him on the ground that the plaintiffs were not entitled to charge the ad valorem rate, without reference to the rate stated. A rule nisi was accordingly obtained, which was afterwards made absolute: see the report, 14 C. B. N.S. 243.

Lush, Q. C. (with whom was *Bayford*), for the appellants.—The Southampton Dock Act, 6 W. 4, c. xxix., after reciting the 43 G. 3, c. 21, and 5 G. 3, c. 168, for improving the port of Southampton, and the London and Southampton Railway Act, 4 & 5 W. 4, c. lxxxviii., incorporates the Southampton Dock Company. The 121st section declares that the docks shall be deemed part of the port of Southampton: and s. 149, which authorizes the levying of tolls or rates on goods landed or shipped in or from the docks, enacts that "the said company shall or may take or receive for every article of goods, wares, or merchandise whatsoever, whether subject to any duties of customs and excise, both or either, or not, which shall be landed or deposited within or shipped from the said dock premises, such rates, rents, or sums, not exceeding the several rates, rents, or sums specified and set forth in the schedules C. and D. hereunto annexed (so far as such goods, wares, and merchandise are particularized in such schedules), for or in respect of wharfage, shipping, unshipping, landing, or re-

landing, loading, housing, unhousing, weighing, and delivering every such article, as the said company or the directors thereof shall from time to time appoint; and that the said company shall or may take or receive *for every article of goods, wares, or merchandise not particularized and set forth in the said schedules C. and D.*, which shall be landed or deposited within or shipped from the said dock premises, for and on the *accounts aforesaid, *such rate, rent, or sum as shall* [*571 *be equal to the rate, rent, or sum rated or affixed on goods, wares, and merchandise of a similar nature, package, value, and quality in and by the said schedules C. and D.*: and the said directors shall from time to time make or cause to be made a table of the rates, rents, and sums charged by the said company, and such table shall be printed and open to inspection in the several offices of the said company, and copies be delivered, free of expense, to any person or persons having occasion for and requiring the same." The import schedule C. contained amongst others the following items,—“Amethysts or agates: case or package, 1s. 6d.” “Bullion: cask or case, 1s. 6d.; small package, 1s.; package not exceeding 5l. value, 6d.” Furniture: very large package, 4s. 6d.; ordinary package, 3s.; middling package, 2s.; intermediate package, 1s.; small package, 6d.” Glass: cask or chest, 1s. 6d.; case or box, 1s.” “Marble: sculptured works of art, and slabs, *according to size and value.*” “Pianofortes: each, 4s. 6d.” “Pictures: bale or case, 4s. 6d.; middling bale or case, 3s.; small bale or case, 1s. 6d.; extra-sized bales or cases to be charged according to dimensions and contents.” “Porcelain: case, 1s. 6d.; small case or box, 1s.” “Prints: engravings: large case, 1s. 6d.; middling case, 1s.; small case, 6d.” The effect of the judgment in the court below is, that, for any article which was never before brought into the port of Southampton, unless it is in the schedule, or can be assimilated to something that is there, the company can make no charge at all for landing. That, it is submitted, is not the fair construction of the act. The schedule gives the maximum charge for the articles mentioned therein: but neither that nor the 149th section excludes the company's common-law right to impose a reasonable charge for things not found there. *The case finds, that, if the company are so [*572 entitled, the charge in question was a reasonable one. This is not like the case of a grant of a toll from the Crown, which must be immemorial and certain: it is a compensation paid to the company in consideration of the large expense they have incurred in providing convenient docks and wharves for the use of the public. They wanted no enabling clause to warrant them in charging a reasonable rate for landing, shipping, and warehousing. The schedule affixes a maximum charge. [BLACKBURN, J.—Is not the making and publishing a scale or schedule of rates a condition?] Suppose the company are required to land a lion, or a tiger, or a hippopotamus, or any other large and dangerous animal,—how are they to be compensated? [BLACKBURN, J.—The words are “on goods, wares, and merchandise of a similar nature, package, value, and quality.” Is not this article the most like a valuable picture,—a Raphael, for instance?] There is nothing in the schedule to which it can be compared in nature, value, or quality. It never could have been intended that the company should have nothing for the enormous risk they would incur

from the carelessness or dishonesty of servants on such an extraordinary occasion as this. [BLACKBURN, J.—The charge for “bullion” is extremely small, and the risk must be large.(a) Diamonds are not mentioned in the schedule: neither are pearls: but these would probably rank with amethysts and agates, the rough article of commerce, which have not yet acquired any great value.(b) If the articles in *573] question can be compared *to anything contained in the schedule, it more nearly approaches “sculptured works of art,” which are chargeable according to size and value. [BLACKBURN, J.—That means, works of art sculptured in *marble*.] This could scarcely be classed with “glass.” Pictures are not liable to risk of breakage or any serious injury in the landing; and the charge is left open where they are extra-sized. [MELLOR, J.—In that case, they are to be charged according to “dimensions and contents,” not *ad valorem*. BRAMWELL, B.—The framer of the act evidently thought that every possible article of import would be in the schedule, or similar in nature, package, value, and quality to something therein. SHEE, J.—Is there any clause which speaks of charging by agreement?] Section 151 does.(c) [BLACKBURN, J.—That relates to warehousing.] It shows at all events, that, where there is any extra trouble, the company were not intended to be limited by the sums mentioned in the schedule. The contention on the other side must be that the company are ousted of their common-law-right. There is nothing in the statute to warrant that.

*574] *Montague Smith*, Q. C. (with whom was *H. James*), for the respondent.—The company's charges for landing, shipping, and warehousing goods are in terms limited to those mentioned in the schedules, and to like charges for goods, wares, and merchandise of a similar nature, package, value, and quality. At the end of schedule D. is the following note, which applies equally to both schedules,—“N. B. Goods not included in the foregoing schedules, to be charged in proportion to the rates therein specified, according to size and weight.” [He was stopped by the court.]

BRAMWELL, B.—Erle, C. J., delivered the judgment of the court below upon a ground on which we propose to give ours, viz. that the 149th section of the act incorporating this company makes provision for the rates, rents, or sums which the company may take in respect of all articles of merchandise which shall be landed or deposited within or shipped from the docks. Various articles are particularized in the schedules for which certain rates are to be taken; and it seems to have been assumed, that, in respect of all other articles which may be landed or shipped, the charge will be ascertained by their being

(a) It was stated to be the practice to hand over bullion at once to the agent, so that little or no risk was incurred by the company in respect of it.

(b) Diamonds and rubies in packages (in the rough) are constantly landed at Southampton, from Ceylon and other places in the east. The trade in pearls from that place is also large.

(c) Which enacts that “it shall be lawful for the said company, and they are hereby authorized, to levy, receive, and take, for and in respect of warehousing any goods, wares, and merchandise which shall be landed or deposited within or shipped from the said dock premises, and for and in respect of coopering, sampling, painting, marking, and other work to be performed and materials to be supplied in respect of such goods, wares, and merchandise, such rates, rents, and sums of money as may be from time to time agreed upon between the owners or consignees of the said goods, wares, and merchandise, and the said company.”

goods of "a similar nature, package, value, and quality" with those that are enumerated. If the 149th section and the schedule had stood alone, it must, we think, be taken to have provided for the charge to be made in respect of every conceivable article. But this view is most strongly confirmed by the N. B. at the end of schedule D., which says that goods not included in the foregoing schedules are to be charged in proportion to the rates therein specified, according to size and weight. It seems to us, therefore, to be perfectly manifest that the schedule must be looked at to see what rates are to be charged. Where the articles are particularized, there is no difficulty: where they are not, the charge is to *be regulated by their [*575 similarity to nature, package, value, and quality to some article the charge for which is defined. It is not for us to say in this case what the articles in question most resemble: but there are several which might be referred to. The schedule is certainly very loose: for, from the head "Curiosities," we are referred to "Presents," and from that to "Baggage," the charge for which ranges between 6*d.* and 2*s.* per package. There is also a head "Furniture:" and others might be referred to. How is it possible to say that the articles now in question are not similar in "value" to some of those named? Cases of difficulty, no doubt, may be suggested. It has been asked how are lions, tigers, and hippopotamuses to be charged: the two former perhaps might be classed with "horses," which are charged 12*s.* 6*d.* each; and the thing in the schedule which the most resembles the latter probably is "a cow," for which the charge is 10*s.* It may also be observed that the only case in which an *ad valorem* rate is charged, is the case of "sculptured marble" or "marble slabs." There is no ground for saying that these things bear any resemblance to those. That being so, it seems to us that there is nothing in the schedule to justify an *ad valorem* charge: and s. 149 does suppose it provides for everything either actually or by reference. Consequently, inasmuch as there is no charge in the schedule which would not be overtopped by the sum which the defendant has paid into court, the judgment of the court below must be affirmed.

Judgment affirmed.

*576]

*REGULA GENERALIS.

TRINITY TERM, 1864.

Sheriffs' Fees.

IT IS ORDERED, that, from and after the last day of this present Trinity Term, the following fees may be taken by the sheriffs, under-sheriffs, deputy-sheriffs, sheriffs' agents, bailiffs, and others the officers or ministers of sheriffs in England and Wales, pursuant to the statute of 1st Victoria, chapter 55, intituled "An Act for regulating the fees payable to sheriffs upon the execution of civil process:"—

£ s. d.

By sheriff for attending in court on the trial of every common jury cause or issue, from the party who entered the same for trial, the sum of 0 10 6

For attending in court on the trial of every cause or issue tried by a special jury summoned by precept under the 108th section of the Common Law Procedure Act, 1852, from the party at whose instance the same was so tried, the sum of 1 1 0

A. E. COCKBURN,
W. ERLE,
FRED. POLLOCK,
SAMUEL MARTIN,
CHARLES CROMPTON,

G. BRAMWELL,
W. F. CHANNELL,
COLIN BLACKBURN,
J. S. WILLES,
J. B. BYLES.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

INT

Trinity Term,

IN THE

TWENTY-SEVENTH YEAR OF THE REIGN OF VICTORIA. 1864.

The Judges who usually sat in banco in this term, were,—
ERLE, C. J., WILLES, J.,
WILLIAMS, J., BYLES, J.

MEMORANDUM.

IN the course of this Term, Lord Chief Justice Cockburn intimated that he had received a memorial from the Serjeants not having patents of precedence, praying that they might be permitted to take their seats within the Bar during the sittings of the Court of Queen's Bench in banc. Looking at the rank and position of those learned persons, and to the fact that in the Common Pleas and Exchequer and in the Court of Chancery they were at all times so accommodated, and in that court also out of Term, he added that their Lordships thought the application a reasonable one, and had great pleasure in acceding to it.

***ALVAREZ DE LA ROSA v. PRIETO. May 22. [*578**

1. The Medical Act, 21 & 22 Vict. c. 90, s. 32, which prohibits an unregistered practitioner from recovering for advice, attendance, or medicines supplied, is not confined to cases in which the patient is sued.
2. Though an unregistered assistant may sue a registered practitioner for salary, an unregistered practitioner cannot sue a registered practitioner for medicines supplied to or attendance upon the patients of the latter at his request.
3. Where medicine or attendance is supplied by an unregistered practitioner to a patient, under a guarantee for payment given by a third person, the statute will afford a defence either

to the principal debtor or to the surety ; for, the patient does not the less require protection because the paymaster is a third person.

4. A medical officer of a Peruvian vessel of war lying in the Thames engaged the plaintiff, an unregistered practitioner, to attend the crew and troops (partly on board the vessel and partly on shore) during his temporary absence. In an action against the Peruvian officer for the services thus rendered :—Held, that the 32d section of the Medical Act precluded the plaintiff from recovering,—for, by whatever law the contract was to be interpreted, the remedy must be governed by the *lex fori*.

THIS was an action for money payable by the defendant to the plaintiff for work and labour done and performed by the plaintiff for the defendant, at his request, and for money found to be due from the defendant to the plaintiff on an account stated between them.

Pleas, never indebted, and payment.

The cause was tried before Byles, J., at the sittings in London after last Michaelmas Term. The facts which appeared in evidence were as follows:—In October, 1862, a Peruvian frigate called the *Arica*, of which the defendant was the chief medical officer, was lying in the Thames, off Blackwall. The defendant, being desirous of taking a trip to Paris, procured the plaintiff, who is a Spanish physician residing and practising at the east end of London, to attend his patients (Peruvian subjects) during his (the defendant's) absence, viz. from the 17th of October, 1862, until the 17th of February, 1863, for an agreed sum (according to the plaintiff's evidence) of 50*l.* per month. The defendant's evidence conflicted with this statement. The plaintiff accordingly attended the crew and troops (about 200 in all), some on board the *Arica*, some on board a transport anchored near her, and others at different houses on shore, during the whole four months. And this action was brought to recover the amount of the *579] *stipulated remuneration, less 15*l.* which had been paid on account.

It being conceded that the plaintiff was not registered as a medical practitioner under the Medical Act, 21 & 22 Vict. c. 90,(a) it was objected on the part of the defendant that he was not entitled to recover for his attendance and advice, the 32d section expressly enacting, that, "after the 1st of January, 1859, no person shall be entitled to recover any charge in any court of law for any medical or surgical advice, attendance, or for the performance of any operation, or for any medicine which he shall have both prescribed and supplied, unless he shall prove upon the trial that he is registered under this act."

For the defendant it was submitted that the prohibition in the statute was confined to the case of an unregistered practitioner suing a patient for attendance or medicines, and did not extend to the case of a contract made by one medical man with another to attend his patients for him,—still less where the attendance was by a foreign doctor upon the subjects of a foreign government on board a foreign ship of war.

The learned judge declined to reserve the point, unless the defendant's counsel would consent to be content with the judgment of the court upon it. And he left it to the jury, upon the conflict of evidence, to say what amount of remuneration the plaintiff was entitled to.

(a) He was a Spaniard and had obtained a diploma at Montpellier, but had been practising as a physician and surgeon for several years in this country.

The jury returned a verdict for the plaintiff for 85*l.* in addition to the 15*l.* paid on account.

Griffiths, in Hilary Term last, obtained a rule nisi to *enter [*580 a verdict for the defendant, or a nonsuit, on the ground that there was no evidence on the trial that the plaintiff was registered under the Medical Act, and that the plaintiff was not entitled to recover without such proof.

Montagu Chambers, Q. C., and *Beasley*, in Easter Term, showed cause.—No registration under the Medical Act was necessary to entitle the plaintiff to sue upon this contract. This is not an action by a surgeon or apothecary against a patient for attendance and medicine: it is an action by one medical practitioner against another medical practitioner, to recover a stipulated sum contracted to be paid by the latter for attendance upon his patients during his temporary absence. It is clearly not a case within the mischief of the statute. It has even been held that a firm consisting of two persons one of whom is registered as a surgeon only and the other as an apothecary, may join in suing for attendance and medicine furnished by both or either in both capacities: *Turner v. Reynall*, 14 C. B. N. S. 328 (E. C. L. R. vol. 108); and *Erle*, C. J., intimated an opinion that the action might be maintained even if one member of the firm was not registered at all. There is no more difficulty in holding this action to be maintainable than in holding that a duly registered medical practitioner may recover for attendances by his assistant. [ERLE, C. J.—That argument would be very cogent if this were an action by Prieto to recover from his patients for the attendance of Dr. De la Rosa upon them in his place.] This is virtually an appointment of a substitute at a salary. Besides, this was not a contract made in this country: it was made on board a Peruvian vessel of war, and therefore the same as if made in Peru, and subject as to its interpretation to the laws of that country. Neither of the contracting [*581 *parties was a British subject. [BYLES, J.—The plaintiff was not a Peruvian: and the contract was to be performed here.(a)] The Medical Act does not apply to a man having a foreign diploma: he could not be registered. The 6th section of the 22 Vict. c. 21, an act to amend the Medical Act, 1858, provides that “nothing in the said act contained shall prevent any person not a British subject, who shall have obtained from any foreign university a degree or diploma of doctor in medicine, and who shall have passed the regular examinations entitling him to practise medicine in his own country, from being and acting as the resident physician or medical officer of any hospital established exclusively for the relief of foreigners in sickness.” This man’s employment may fairly come within that section. He was a Spaniard who had duly obtained a diploma abroad. Suppose a Frenchman found in this country a man whom he had attended in France, might he not sue him here for the debt thus contracted?

Griffiths, in support of his rule.—This case falls clearly within the mischief the Medical Act was aimed at. It never was intended that a registered practitioner should be able to get an unqualified person

(a) See *Grell v. Levy*, *antè*, p. 73.

to attend his patients during his absence. The statute was passed for the security of the patient,—that he should know that he is in the hands of a person of competent skill and knowledge. [BYLES, J.—A great many attendances, in the case of a medical man in large practice, must be given by assistants.] In that case the assistant is acting under the immediate superintendence and control of his principal. The mode of payment is nothing: the question is, whether the services sued for are medical services. The plaintiff did not enter *582] the *service of the defendant in the capacity of an assistant: but he contracted as his substitute to give his services as a medical practitioner to the crew and troops belonging to the Arica, some being on board that vessel, some on board another ship, and some on shore. The 6th section of the 22 Vict. c. 21 goes far to show that such attendance as this is within the former act. This is not like the case of a foreign surgeon acting on board a foreign ship. The *lex fori* must govern the procedure. *Cur. adv. vult.*

BYLES, J., now delivered the judgment of the court: (a)—

We are of opinion that the plaintiff, being an unregistered medical practitioner, cannot recover for medical attendance afforded to the patients of the defendant on the defendant's credit.

It was contended at the trial that the act of parliament 21 & 22 Vict. c. 90, ss. 31 and 32, did not apply to contracts between medical men themselves, but was confined to cases in which the patients are sued for medicines or medical attendance.

We agree that the act has no application in the case of an unregistered assistant suing a registered practitioner for his salary. But, where the action is brought either against the patients themselves, or against any one who is to pay for medical attendance or medicine prescribed and supplied to them, we think the statute applies.

Suppose medicines administered by an unregistered practitioner to a patient, under a guarantee for payment given by a third person, the statute would, we conceive, be a defence either to the principal *583] debtor or *to the surety. Suppose medicines administered to the poor of a parish or union, on the credit of overseers of the parish or guardians of the union, the statute would in like manner be a defence; for the case would fall both within the words and the spirit of the enactment. The patient does not the less require protection, because the paymaster is a third person.

In the case now under consideration, the defendant, when he went abroad, and engaged the plaintiff to act in his place, agreeing to pay for medical attendance afforded by the plaintiff during his absence, was in the situation of an ordinary paymaster; and not the less so because he happened to be a medical man, for, the patients during his absence had no benefit from his skill or attendance.

It was further contended, that, the ship on board of which the contract was made being a Peruvian ship of war lying in the Thames, the contract was not governed by the municipal law of this country, but by the law of Peru. For many purposes, a foreign vessel of war, not only on the high seas, but even in the waters or ports of a friendly state, is undoubtedly considered as foreign territory; and in

(a) The judges present at the argument were, Erle, C. J., Willes, J., and Byles, J.

some cases the local jurisdiction may be excluded: see Wheaton's Elements of International Law, p. 189, and 1 Kent's Commentaries, p. 164, n. It is easy to perceive that questions of great complexity and difficulty may arise: and, if this contract had been made not only on board the vessel, but between parties who were on both sides part of the crew, and if it had been a contract to be entirely performed on board the vessel, and if the question had arisen otherwise than in the form of an action in an English court requiring certain proof to be given at the trial, there might have been much weight in the suggestion.

But, first, the contract was not made between *Peruvians [*584 only, but was made between a plaintiff domiciled in England and a Peruvian,—the plaintiff being by the laws of this country subject to a personal disqualification. Secondly, it was not to be performed entirely on board the vessel, but partly on shore: and, generally speaking, a contract is to be governed by the law of the country where it is to be performed. So that it is impossible that the Peruvian law should entirely govern this contract. Thirdly, the disqualification of the plaintiff to sue in England for medical attendance afforded by him within the ambit of English territory, arises from the necessity of proving his registration at the trial. It is part of the *lex fori* of the country where the remedy is sought: and, even in cases where the law of another country is to interpret the contract, yet the *lex fori* is to govern the remedy: see *Huber v. Steiner*, 2 N. C. 202, 2 Scott 304; *Doun v. Lipman*, 5 Clark & Fin. 16, 17; *Story's Conflict of Laws*, 2d edit. 840.

The rule must therefore be made absolute to enter a nonsuit.

Rule absolute.

ROBERT LEADER, Appellant; DAVID YELL, Respondent.
May 31.

The 6th section of the 3 & 4 Vict. c. 61, imposes penalties upon a person who for the purpose of obtaining an Excise license to retail beer, produces or makes use of a certificate of "good character" (as required by the 2d section of the 4 & 5 W. 4, c. 85,) knowing the same to be false:—Held, that the mere fact of the party living in a state of concubinage was not such an absence of "good character" as to justify a conviction for using the certificate knowing it to be false,—*dubitante Williams, J.*

THIS was an information preferred by David Yell, of Newton, in the Isle of Ely, and county of Cambridge, labourer, against Robert Leader, of the same place, blacksmith, for that the said Robert Leader, on Friday, the 9th of October, 1863, at the parish of Long *Sutton, in the parts of Holland, and county of Lincoln, for [*585 the purpose of obtaining for himself a license to retail beer or cider, unlawfully, did make use of, to one Samuel Cooke, of Holbeach, in the said parts of Holland, an officer of the inland revenue, a certain certificate required under the provisions of the statute in that behalf made and provided, to wit, a certificate in the words and figures following, that is to say,—

"We, the undersigned, being inhabitants of the parish of Newton, in the county of Cambridge, and respectively rated to the poor at not

less than 6*l.* per annum, and none of us being maltsters, common brewers, or persons licensed to sell spirituous liquors, or being licensed to sell beer or cider by retail, do hereby certify that Robert Leader, dwelling in Newton, in the said parish, is a person of good character. Dated, &c." [Here followed the names and residences of six persons.]

"I do hereby certify that the above-named applicant is the real resident holder and occupier of the said house, and that the true rent or annual value at which such house with the premises occupied therewith is rated in one rating to the poor-rates, according to the last sum or rate made and allowed in such parish to the relief of the poor, is the sum of 13*l.*: And I further certify that all the above-mentioned persons whose names are subscribed to this certificate are inhabitants of the parish of Newton, rated to 6*l.* to the relief of the poor of the said parish. Dated, &c.

"SAMUEL SHIPLEY,

"Overseer of the said parish."

The said Robert Leader then and there well knowing one or more of the matters certified therein, to wit, that the said Robert Leader was a person of good character, and that the said Robert Leader, as the *586] applicant named in the application attached to the *said certificate, was the real resident holder and occupier of the said house, and the true rent or annual value at which such house with the premises occupied therewith is rated in one rating to the poor-rates according to the last sum or rate made and allowed in such parish for the relief of the poor, is the sum of 13*l.*, to be false; contrary to the form of the statute in such case made and provided."

After hearing the parties and the evidence adduced by them, the justices did thereupon dismiss that part of the charge against the said Robert Leader relating to his unlawful use of the certificate of the rating or assessment of his house and premises, but did convict him under the 6th section of the 3 & 4 Vict. c. 61, of the charge of having unlawfully made use of the said certificate so far as he was thereby certified to be a person of "good character," he the said Robert Leader then and there well knowing such statement to be false.

The said Robert Leader, being dissatisfied with the said determination as being erroneous in point of law, demanded a case, which was stated as follows:—

It was proved on the part of the informant, that the defendant did make use of the above-mentioned certificate by presenting the same in person, on or about the 9th of October last, to Samuel Cooke, the officer of excise then sitting or acting officially at Long Sutton; that the defendant had been previously to the said 9th of October cautioned by Samuel Shipley, the overseer of the said parish of Newton, that he (Shipley) had received a letter from Mr. John Barwise, the supervisor of excise for the same district, stating that he (Mr. Barwise) had received an intimation that the certificate was untrue or incorrect, and was objected to; that, notwithstanding such caution, he (the defendant) *587] did apply for and obtain a license for *selling beer by retail on his aforesaid premises; that the defendant has been ever since the year 1854, and still is, living in open concubinage with a widow woman named Cox, and has three illegitimate children by her, all now living in the house with them, and that, from 1854 to 1859, he was also frequently drunk; that the defendant has been several times

warned by two successive curates of the parish of Newton of the immorality and guilt of his course of life, and desired by those gentlemen to reform himself and marry the woman; that one of those gentlemen, on being applied to by the defendant, refused to receive the children in question at the defendant's hands into the church, or otherwise to baptize them, in consequence of the defendant's living with and refusing to marry Cox: and it was further stated on oath by the two parties who had lastly so signed the said certificate of good character, that they signed the same without in fact reading the certificate or otherwise knowing its contents, and that, if they had read it, they should certainly, both knowing the defendant's course of life in the matter aforesaid, have refused to sign the same.

It was thereupon objected by the defendant's attorney that mere proof of immorality in a man did not constitute him not to be "a person of good character," but that it was necessary to prove him to have been guilty, and convicted, of some criminal offence, to deprive him of that quality.

The magistrates thereupon did adjudge and determine that the defendant was not a person of good character, and did convict him of the offence of having unlawfully used the aforesaid certificate of his being such a person, he well knowing the same to be false; and did further adjudge and determine that he should forfeit and pay for such offence the mitigated penalty or sum of 40s., besides costs, and should moreover forfeit the license so obtained as aforesaid.

*If the court should be of opinion that the determination on the above point was correct, then the conviction was to be confirmed. But, if the court should be of a contrary opinion, then the conviction was to be quashed. [*588]

Denman, Q. C., for the appellant.—The 1st section of the 4 & 5 W. 4, c. 85, enacts that "it shall be lawful for the commissioners of excise, or other persons duly authorized, to grant licenses for the sale of beer, ale, porter, cider, or perry, under the provisions of the 1 W. 4, c. 64, to any person applying for the same, but that such license shall not authorize the person obtaining it to sell beer or cider to be drunk or consumed in the house or on the premises specified in the same license, unless the same be granted upon the certificate hereinafter required." The 2d section requires every person applying for a license to sell beer or cider to be drunk on the premises, to deposit, with the commissioners of excise, "a certificate signed by six persons residing in and being and describing themselves to be inhabitants of such parish, township, or place" [in which the person so applying intends to sell beer or cider by retail], "and respectively rated therein to the poor at not less than 6l., or occupying a house therein rated to the poor at not less than 6l.,—none of whom shall be maltsters, common brewers, or persons licensed to sell spirituous liquors or beer or cider by retail, nor owners or proprietors of any house or houses licensed to sell such liquors or beer or cider by retail,—stating that the person applying for the license is of good character, and that at the foot of such certificate one of the overseers of the parish, township, or place shall certify (if the fact be so) that such six persons are inhabitants respectively rated as aforesaid." And s. 8 enacts, that, "if any person

Whereupon the magistrates adjudged and determined that the defendant was not a person of good character, and convicted him of the offence charged. I think it is very clear that magistrates have a very wide discretion in the case of offences over which they have a summary jurisdiction: and I do not in the smallest degree intend to interfere with it. But I take the point I have stated to be the point of law *593] upon which the *magistrates seek the guidance of the court. I can find nothing in the case to impeach this man's character, save the mere fact of his cohabiting with a woman without the ceremony of marriage. I find no suggestion of any open violation of decency. The finding of the fact that between the years 1854 and 1859 the appellant was frequently drunk, shows that there has been a very strict inquisition upon this man, and nothing like want of sobriety had been detected since 1859. Under these circumstances, six of the appellant's neighbours certified him to be a man of good character, and he has availed himself of that certificate to obtain a license, and by a course of industry to earn a maintenance for himself and those whom he is morally bound to support. I cannot think the circumstances I have alluded to did make it compulsory upon the magistrates to convict. I take it the words "good character" were introduced for the purpose of avoiding the evils which had been found to result from the multiplication of houses licensed to sell beer, ale, and cider by retail, which in too many instances were found to be the resort of the enemies of order, morality, and religion,—places where the abandoned of both sexes were harboured and the public feelings outraged. Persons who fostered and encouraged these things would undoubtedly be persons of bad character. They would not be very likely to get certificates of good character from their neighbours: and, if they did, they might very properly be convicted for using them. But the fact of a man living with a woman without marrying her may possibly admit of some palliating circumstances. It does not follow, therefore, that, because the appellant knew he was not married to the widow, he must necessarily have known that the certificate which he had obtained was false. Good or bad character does not *594] depend upon what a man knows of himself: it means his general reputation in the estimation of his neighbours. The only evidence of knowledge here was, that he had been remonstrated with by the curates for not marrying the woman, and he refused to yield to their good offices. I cannot help thinking that their refusal to baptize the man's children would very much diminish the effect of their remonstrances. To withhold such a solemnity from the offspring on account of their parents' guilt, was not only a want of christian charity but in my judgment a grievous dereliction of a sacred duty.

WILLIAMS, J.—Looking at the question submitted to us by the magistrates, and the narrow view which has been pressed in argument and adopted by my Lord, I agree that the conviction ought to be quashed. But at the same time I cannot help entertaining some doubt whether it was intended by the magistrates to put the question in that narrow way. If the magistrates thought that the mere fact of this man living in a state of concubinage constituted him not a good character, and so he was using the certificate knowing it to be false, they thought wrong. But I must say that I think there was

evidence here which would have warranted them in coming to the conclusion that the appellant was not a person of good character, and that, when he made use of the certificate in question for the purpose of obtaining a license, he knew it to be false. It may be wrong in the abstract to say that a man who lives with a woman in a state of concubinage is not a man of good character. It may be one thing to live in that state in privacy; but the offence against morality and decency may be very much aggravated by its being carried on openly and notoriously by a man who chooses to put himself in a public station where the attention of his neighbours is more likely *to be called to his domestic relations. It may be that the legis- [*595] lature thought that houses of this description should be conducted by persons whose morality and decency of life would be likely to discourage scenes of drunkenness and debauchery. If the magistrates so thought, it seems to me that the circumstances proved here were sufficient to justify them in coming to the conclusion that the appellant was not a person of good character, and that he knew it. But, taking the question in the view in which my Lord has taken it, I agree that the conviction was wrong and should be quashed.

WILLES, J., had gone to Chambers; but it was understood that he concurred in the opinion of the Chief Justice.

BYLES, J.—I also am of opinion that this conviction must be quashed. I agree with my Brother Williams that “character” does not mean a man’s real conduct and mode of life, but that it means his reputation among his neighbours,—pretty much the same as witnesses who are called to character are asked on examination in chief. In the present case, six of this man’s neighbours certified him to be a person of good character, which they would hardly have done if they had known him to lead a life of open and notorious profligacy. He had been guilty of no criminal offence which the law could recognise: and I do not see upon the face of the case any evidence which ought reasonably to have satisfied the magistrates that he knew the certificate to be false. I concur in the observations which my Lord has made as to the conduct of the clergymen. Adopting that high standard of morals which it is their duty upon every proper occasion to uphold and to enforce, in endeavouring to persuade this man to marry the woman they did right; but, in *refusing to baptize [*596] the children, their conduct is open to grave censure.

Naylor observed that the statement in the case that one of the curates had refused to baptize the appellant’s children was incorrect. The children were baptized, but the clergyman thought it his duty not to permit the parents to be sponsors.

ERLE, C. J.—I am glad to hear Mr. Naylor’s explanation. If the fact be so, I recall the remarks I made. We can only look to the facts which are stated to us by the magistrates.

Denman asked for the appellant’s costs.

ERLE, C. J.—My Brother Willes thought the appellant ought to have his costs: but my Brother Williams and myself think the case falls within the usual rule that costs are not given for a mistake of the judge.(a)

(a) This is the principle adopted on appeals under the Registration Act, 6 & 7 Vict. c. 18. The respondent never pays costs. But see *Schroeder, app., Ward, resp.*, 13 C. B. N. S. 410 (*E. C. L. R.* vol. 106).

Denman.—In *Venables v. Hardman*, 28 Law J., M. C. 33, upon an appeal against a conviction under a local turnpike-act, for taking an illegal toll, the conviction being quashed, the party prosecuting was made to pay costs; Lord Campbell saying: "Section 6 of the 20 & 21 Vict. c. 43 provides that the justices are not to be liable to any costs in respect or by reason of an appeal against their determination; but I think that the costs ought to be paid by the party prosecuting."

*597] *ERLE, C. J.*—That was a case under a turnpike-act, *where the party prosecuting had an interest. So, in the case under the Metropolis Local Management Act, where the party appealing had an interest.(a) But this is the case of a common informer, who never could have contemplated litigation in a superior court. We think there should be no costs.

Conviction quashed, without costs.

(a) See *The Vestry of St. George, Hanover Square, app., Sparrow, resp., antè*, p. 209. The vestry were made to pay costs, though acting in the performance of a public duty.

And see *Gerring, app., Barfield, resp., next case.*

CHARLES GERRING, Appellant; FREDERICK HENRY BARFIELD, Respondent. *June 2.*

The mere fact that a piece of ground, part of a public highway, has for twenty years been used by an innkeeper for the standing of the vehicles belonging to his guests, is no answer to a complaint for the obstruction under the 72d section of the Highway Act, 5 & 6 W. 4, c. 50.

THIS was a case stated for the opinion of the court under the 20 & 21 Vict. c. 43:—

At a petty sessions holden at Farringdon, in and for the division of Farringdon, in the county of Berks, on the 19th of January, 1864, before two justices of the peace in and for the said county, an information preferred by Frederic Henry Barfield, the district surveyor of the Farringdon highway board (hereinafter called the respondent) against Charles Gerring, innkeeper (hereinafter called the appellant), under s. 72 of the 5 & 6 W. 4, c. 50,(a) charging that he the said *598] Charles Gerring, on the 5th of January last, at, &c., unlawfully and wilfully did obstruct or cause to be obstructed the free passage of a certain highway there situate, leading from Marlborough Street to Gloucester Street, by then and there placing or causing to be placed, and leaving or causing to be left, thereon certain carriages or other vehicles for a long and unreasonable time, to wit, two hours and upwards, and without just cause, contrary, &c., was heard and determined by them, the said parties respectively being then present; and upon such hearing the appellant was duly convicted of the said offence, and adjudged to pay a fine of 6*d.*, and 16*s.* 6*d.* the costs incurred by the respondent.

A case being demanded by the appellant, the justices stated as follows:—

At the hearing of the information, it was proved on the part of the informant (the respondent in this appeal) that the defendant (the appel-

(a) Which enacts, that, if any person shall,—amongst other things,—“in any way wilfully obstruct the free passage of any highway,” he shall forfeit and pay any sum not exceeding 4*l.*

lant in this appeal) had on the day named, which was the ordinary market-day of the town of Farringdon, placed divers gigs or carts on a certain piece of ground opposite the house of the appellant, which is a public inn, and which piece of ground lies between the two streets before named, and until the recent erection of a corn exchange was (with a portion of Marlborough Street and its footpath) the site of the corn-market.

It was also proved that this piece of ground had been invariably repaired at the expense of the parish out of the highway-rate, and had been stoned and metalled the same as the other streets and roads in the town and parish, and had also been recognised as a highway by the highway-board of the district.

It was also proved, that, by reason of the vehicles being so placed on the ground, the free and ordinary passage between Marlborough and Gloucester Streets had been made less convenient.

*The waste land of the manor of Farringdon, within which the town is situate, and the right to toll on cattle, corn, and goods sold and delivered therein, belonged to Daniel Bennett, Esq., the lord of such manor: and the appellant proved that he had been in the habit of placing his customers' gigs in the street in front of his house, but not on this particular piece of ground, on market-days, for a long period of time, far exceeding twenty years, without making any payment to the lord or his lessee: but in this instance, he had by arrangement paid the lessee one shilling for the privilege of placing them there. He also proved that sums had been occasionally taken by the said lessee from licensed hawkers and other traders selling their wares by auction and otherwise on the said piece of ground; vans and carts belonging to whom were left during such sales and during any portion of the market-day thereon. It was also proved that public exhibitors had occasionally been permitted to occupy such piece of ground, on making a payment to the lessee for the privilege. [*599]

It was not shown, however, that any payment had ever been made in respect of empty vehicles standing on the ground in question, until the present occasion: but it was proved that a money payment had been occasionally made to the lessee for such a purpose in respect of a piece of ground lying in front of another inn in the town, and between the carriage-road and footpath, and which last-mentioned payment was shown to have commenced upwards of twenty years ago.

It was contended on the part of the defendant (the appellant in this appeal),—first, that the two streets over which the public passed could be approached from either side irrespective of any obstruction caused by the vehicles being placed on the piece of ground in question, inasmuch as such vehicles occupied no larger space than had been accustomed to be occupied for the purposes aforesaid; and that no obstruction of the free passage within the meaning of the act had therefore been proved; and that, even assuming a slight abridgment of the free passage did exist, yet that being on the ordinary market-day the uninterrupted use of the ground for market purposes for a period long exceeding twenty years, would be an answer to the proceedings,—secondly, that the evidence adduced showed a right in the lord of the manor to authorize the appropriation on market-days of the piece of ground in question for the purposes aforesaid; and [*600]

that, although the vehicles complained of were not actually used in the sale or in the conveyance for the purpose of sale of marketable articles, yet that they were entitled to the like advantages, inasmuch as they belonged to farmers and traders attending the market for strictly market purposes, and that, in some instances, the sample sacks in ordinary use in corn exchanges were conveyed in such vehicles.

The magistrates, being of opinion that the evidence given before them proved the ground in question to be part of the highway, and that an obstruction to the free passage of the same had been created within the meaning of the 72d section of the 5 & 6 W. 4, c. 50, and being also of opinion that the voluntary payment to the lessee of the lord of the manor for the privilege claimed in this and the other case mentioned was not in the nature of a market-toll, which in the case of empty vehicles could according to the custom be legally demanded, gave their determination against the appellant in the manner before stated.

The questions of law arising on the above statement therefore were,—whether the circumstances set out proved an obstruction to *601] the free passage of the *highway within the meaning of the act, and whether it was any answer thereto that the appellant had exercised the privilege of placing empty vehicles on the street near for a period of twenty years and upwards on market-days; and whether the fact of his making a payment to the lessee of the tolls (coupled with the fact of a similar payment having been made in the other case referred to for a period of twenty years and upwards), could be considered in the nature of a market-toll, and would give him any right to use the piece of ground in question for the purpose mentioned.

Cole, for the appellant.—The case shows the origin of the highway and its limited nature. It does not, it is submitted, disclose such an obstruction as the statute contemplated. This, indeed, was hardly a part of the highway at all; it was in fact part of the corn-market: and the obstruction, if any, was merely one of those limited obstructions which are tolerated by the law. The soil being originally in the lord, the highway must be claimed by dedication, which may be qualified: and here the lord appears to have exercised rights over it which are inconsistent with an absolute and unqualified dedication. In *The King v. Smith*, 4 Esp. N. P. C. 111, it was held, that, where a place has been used as a public fair or market for above twenty years, to which persons have resorted for the purpose of there exposing articles for sale, they shall not be liable to be indicted for a nuisance, as for obstructing a highway, if fairly engaged in using the place as a fair or market. [WILLES, J.—That only means that long user may be evidence of a fair or market having immemorially been held there,—like the case of *Ellwood v. Bullock*, 6 Q. B. 383 (E. C. L. R. vol. 51), where it was held that a custom to have a booth on the street on *602] market-days was reasonable, for that the highway *might have been granted before legal memory, subject in parts to interruption for a lawful public purpose for a limited time.] The judgment of Lord Denman in that case, it is submitted, fully sustains the argument here. “It may well be,” says his Lordship, “that the mayor, aldermen, and burgesses of Bury may have had the right of holding a fair (the right being claimed as immemorial) upon the locus

in quo before the same became a highway; and therefore that the dedication thereof to the public may have been subject to a partial obstruction during the continuance of the fair for a certain limited and not unreasonable time. It is not, therefore, a general and total obstruction of a public right, but a partial and limited one, both as to extent and duration, the public, during such limited obstruction, deriving, as has been already observed, a benefit which may well be considered as equivalent." So, here, the claim is a limited one, to stand vehicles on the spot in question on market-days. It is not a case which comes within the mischief against which the strong words of the Highway Act were directed.

Griffiths, for the respondent, was not called upon.

ERLE, C. J.—I am of opinion that the conviction in this case should be confirmed. The magistrates find, and the evidence fully justifies that finding, that the place in question is a highway, over which the public had a right to pass without obstruction. Then, this being clearly a highway, and there being no evidence of any immemorial right in any person to abridge or obstruct that right, there is no pretence for saying that the conviction was wrong. All that appears, is, that, for a certain time, the appellant has kept an inn, and it being convenient to him so to do, he has from time to time used the piece of ground in question for *standing thereon the empty vehicles of [*603 his customers or guests,—some of their owners very likely using the market. But there is not a trace of evidence of any immemorial usage, or of any right derived from the owner of the soil, to justify the appellant.

WILLIAMS, J.—I am of the same opinion. The magistrates have found that in point of fact the spot in question was part of the highway, and that the appellant obstructed it; and the only question is whether it was wilfully done,—whether he has shown that he had any right to do it. If the appellant could have made out an immemorial right, it might be that the highway might have been dedicated subject to that right. But there was no such proof,—no proof of a dedication after this usage began, so as to bring it within that rule.

WILLES, J.—I am of the same opinion. The evidence offered on the part of the appellant only amounted to this, that the public had for a certain time been content to tolerate a nuisance. That could avail nothing against the clear proof that the public had a right to the way without obstruction.

BYLES, J.—I am of the same opinion. As regards private rights, twenty years' user is important. There may be a presumption creating or extinguishing a right by user or non-user. But, once a highway, always a highway. Twenty years' user may be evidence of an original dedication subject to prescriptive encroachments on the highway of a temporary and limited nature. But here there was nothing beyond evidence that for twenty years the spot in question had been used for the standing of the empty vehicles of the innkeeper's guests, without any complaint having been *made. The payments to [*604 the lord of the manor do not strengthen the case. I think the magistrates decided correctly upon the evidence before them.

Griffiths asked for costs.

Cole submitted, that, seeing that the appellant had for so long used

the spot in the same way without objection, it was hardly a case for costs.

PER CURIAM.—The conviction must be affirmed with costs.

Conviction affirmed, with costs.

ROBERT WILLIAM COLES, Appellant; JOHN DICKINSON
and Others, Respondents. *June 9.*

1. By the 73d section of the 7 & 8 Vict. c. 15, premises which are used solely for the manufacture of *paper* are excluded from the operation of the Factory Acts.

2. A. was possessed of paper mills in Hertfordshire and of a mill at Manchester. At the latter place he employed steam-power to prepare what is called "half-stuff," which is made from cotton-waste and refuse and rags. The half-stuff was afterwards sent to the mills in Hertfordshire to be manufactured into paper:—Held, that the mill at Manchester was exempted from the operation of the Factory Acts,—although the "half-stuff" was capable of being converted into articles other than paper.

THIS was an appeal against a decision of a stipendiary magistrate, under the 20 & 21 Vict. c. 43:—

Messrs. John Dickinson & Co., of Nash Mills, in the parish of Abbots Langley, in the county of Herts, who carry on the business of paper-makers there and elsewhere, appeared before the stipendiary magistrate for the city of Manchester, on the 30th of October, 1863, pursuant to a summons obtained against them by Robert William Coles, sub-inspector of factories, upon an information and complaint *605] which (omitting *formal parts) charged them for that on the 14th of October, 1863, they did employ a young person, to wit, Frederick Beardsall, in a certain factory occupied by them in the said city, without having registered his name and the date of the first day of his employment, as by law required.

Upon the hearing of this information, the following facts were proved:—Frederick Beardsall, the boy mentioned in the summons, was under sixteen years of age, and was employed by the respondents on the 14th of October, 1863, at their mill in Elm Street, Manchester, and he worked there as a waste carrier, or, in other words, was employed in carrying cotton-waste and rags to and from a willoving or cleaning-machine previous to and after being cleaned; and his name and the date of the first day of his employment were not registered.

The respondents use steam-power in their mill in Manchester for the purpose of moving machinery.

Since the mill in Elm Street, Manchester, has been established, all the material cleaned and prepared there has been forwarded to the respondents' Hertfordshire works, and there made into paper. On no occasion has any material prepared in Manchester been sold by the respondents at that place or elsewhere, or used by them for any purpose except for that of paper making.

In all paper-works, the material used for the manufacture of the paper is subjected to a process before being made into paper, by which it is reduced to the state of half-stuff or semi-pulp: and many paper-makers have establishments for the purpose of reducing their material to this state, situated at considerable distances from the mills where the manufacture is completed.

The only work done in the Elm Street mill is the *sorting, [*606 cleaning, and breaking up of cotton-waste, rags, and other material, and reducing the same into a state known to the trade as half-stuff. The cotton-waste so cleaned and prepared consists of the sweepings and refuse which accumulate in the course of spinning cotton, and the old materials which have been used for wiping and cleaning machinery.

For the purpose of cleaning and preparing the cotton-waste and other materials, the respondents employ the under-mentioned processes,—

1. Dusting. This process consists in the cotton-waste being placed in a revolving sieve-like machine, moved by steam-power, which shakes the dust out of it:

2. Picking. After having been dusted, the cotton-waste or other material is carefully picked over by hand, and all foreign substances removed from it:

3. Willowing. After having been picked, the cotton-waste is put into a machine called a willow, within which is a revolving cylinder studded with rows of blunt iron teeth, which, coming into contact with the cotton-waste, open the fibres and clean it.

4. Boiling. After having been willowed, the cotton-waste is boiled with lime and alkali, for the purpose of removing the grease:

5. Washing and grinding. These processes are performed by the same machine, which is known as a "rag-engine." This engine consists of a cistern with a middle partition, on one side of which revolves a roll fitted with steel blades that can be brought more or less in contact with other blades fixed below, and thus shorten the staple of the cotton-waste or other material, or grind it:

6. Second washing, willowing, dusting, and packing. Washing the cotton-waste only without grinding, is frequently done by the same engine. After the first *boiling and washing, and packing, [*607 the cotton-waste is boiled a second time, still further washed and ground, pressed dry with a hydraulic pressure, then willowed, then dusted, then willowed again, and afterwards dried and packed.

These are the only processes performed by the respondents in their mill in Manchester. All of the above processes used by the respondents in cleaning and preparing their cotton-waste, rags, and materials, are also generally used by waste-cleaners carrying on business in Manchester and elsewhere. The premises of such waste-cleaners are considered to come within the Factory Acts, and are under inspection accordingly. The cotton-waste and material thus cleaned are fit for the manufacture of paper; and the same is also fit for the manufacture of wadding, or for being mixed with other cotton, spun over again, and manufactured into cotton goods.

It was admitted, that, if the mill of the respondents was a factory within the meaning of the 7 & 8 Vict. c. 15, s. 73, and not within the exception in that section, the respondents were liable to be convicted.

It was contended for the appellant, that the mill of the respondents was a factory within that section, being used for the preparing of cotton; and that it was not within the exception, not being a factory or part of a factory used solely for the manufacture of paper.

For the respondents, it was contended that this mill was within the

part of a factory used solely for the manufacture of paper. It is clear that this building is part of a factory which is used solely in the manufacture of paper. As to the second point suggested by Mr. Mellish, it will be time enough to consider it when it comes before us. At present we say nothing about it: nor do we say anything about the statement that the materials prepared at the Manchester premises may be used in the manufacture of wadding. It is enough to say that the magistrate has come to a right conclusion.

The rest of the court concurring,

Decision affirmed.

***612] THE GUARDIANS OF THE SOCIETY OF KEELMEN
ON THE RIVER TYNE v. JOSEPH DAVISON and
Others. June 2.**

1. By a local act, 1 G. 4, c. liii., a toll or tax of $\frac{1}{4}$ d. per chaldron is imposed upon the owners or lessees of "any collieries or coal-mines near the river Tyne," for every chaldron of coals sold or delivered by them to be exported from or out of the said river, and which shall be so exported; such toll "to be collected or received at the offices or places respectively where the contracts for the sale or delivery of such coals are usually made,"—in aid of the Tyne keelmen's charitable fund created by the 28 G. 3, c. 59.

Since the formation of railways and docks, the services of the keelmen in the shipment of coals on the Tyne have become unnecessary, the coals being brought down to the wharfs or quays by railways, and shipped direct:—

Held, that coals shipped on the Tyne from collieries "near" to the river were still liable to the payment; and that a colliery situate ten miles from the Tyne is "near the said river Tyne," within the meaning of the act.

2. Held also, that coals brought for shipment to the Tyne, by a public railway, from collieries which before the formation of the railway had always shipped their coals on the river Wear, to which they had been conveyed by private tramways from the collieries, were equally liable to the keelmen's dues.

THIS was an action brought to recover the sum of 173*l.* 11*s.* 2*d.*

The declaration was for money payable by the defendants to the plaintiff for certain dues, rates, duties, and sums of money alleged to be due and payable to the plaintiffs by the defendants as the owners or lessees of a colliery or coal-mine near the River Tyne, called Bedlington, under and by virtue of an act of parliament made in the session of the 1st year of his late Majesty, King George the 4th (c. liii.), intituled, "An Act for altering and amending an act of his late Majesty for establishing a permanent fund 'for the relief and support of skippers and keelmen employed upon the river Tyne, their widows and children, and for augmenting the said fund,' in respect of certain coals exported from and out of the said river, and by the defendants sold and delivered to be so exported.

The defendants pleaded never indebted; upon which issue was joined.

The cause came on to be tried before Martin, B., at the Spring Assizes at Newcastle in 1863, when a verdict was found for the plaintiffs for the amount above mentioned, subject to the opinion of the court upon the following case:—

***613]** 1. The plaintiffs are the guardians of the society of *keelmen on the river Tyne; and the defendants are and have been for many years the lessees of the Bedlington colliery.

2. By an act of parliament passed in the 28 G. 3 (c. 59), intituled "An Act for establishing a permanent fund for the relief and support of skippers and keelmen employed on the river Tyne, who by sickness or other accidental misfortunes, or by old age, shall not be able to maintain themselves and their families; and also for the relief of the widows and children of such skippers and keelmen," the said skippers and keelmen were formed into a society for the purpose of raising and establishing a permanent fund to be applied in maintaining and supporting themselves and their families in case of sickness, old age, or infirmity, and their widows and children, to be called "The Society of Keelmen on the river Tyne;" and guardians were appointed for the orderly management of the funds and affairs thereof; and such guardians and their successors were created a body politic and corporate under the name and description of "The Guardians of the Society of Keelmen on the River Tyne," with power to make by-laws and ordinances for establishing and carrying on the affairs of the said society; and, for raising a fund for the purposes aforesaid, it was enacted that the crew of every keel employed upon the said river should contribute out of their wages certain sums of money, to be applied to the purposes of the said act.

3. By the said act of parliament passed in the 1 G. 4, after reciting the above-mentioned act, and that the moneys thereby raised had been applied to the purposes of the said act, and that great benefit had resulted therefrom as well to the said skippers and keelmen, their widows and children, as to the parishes and townships where they were legally settled, but that, *owing to the pressure of the [*614 times and other circumstances, such moneys had become inadequate to meet the payments due and to become due to the several persons entitled to relief from the said fund; and that the owners and lessees of collieries and coal-mines upon or near to the said river, being desirous of aiding the said fund and promoting the good ends and purposes of the said society, at a general meeting of such owners or lessees had proposed that the said guardians and their successors should be empowered and authorized by law to collect and receive from such owners and lessees the sum of $\frac{1}{4}$ d. per chaldron on all coals exported from and out of the river Tyne,—it was enacted, "that, for the purpose of aiding the said fund, and enabling the guardians of the said society of keelmen and their successors to make payment to the several persons entitled to any relief or allowance from or out of the said fund, of the sums directed to be paid by the said recited act and the by-laws and ordinances made or to be made by the said guardians under the authority of the said act, and for the better effecting the purposes thereof, it shall and may be lawful to and for the said guardians of the said society of keelmen to demand and take of and from the owners or lessees or owner or lessee of *any collieries or coal-mines near the said river Tyne selling or delivering coals to be exported from or out of the said river*, the sum of $\frac{1}{4}$ d. per chaldron (reckoning 53 cwt. to the chaldron) for every such chaldron of coals so sold or delivered to be exported from or out of the said river, and which shall be so exported; such sum of $\frac{1}{4}$ d. per chaldron to be rendered and paid at the respective times thereafter directed, to the said guardians of the said society, or to the officers or persons, officer or

person, appointed by them to collect or receive the same, at the offices or places respectively where the contracts for the sale or delivery of such coals are usually made.

*615] *4. The above-mentioned acts of 28 G. 3, c. 59, and 1 G. 4, c. liii., together with the pleadings in the cause, were to be taken as part of the case.

5. The Bedlington colliery belonging to the defendants was not opened at the time of the passing of the 1 G. 4, c. liii. It was first opened in the year 1841, and for more than ten years coals raised at this colliery have been largely exported from the river Tyne.

6. The situation of the Bedlington and other collieries mentioned in this case were shown on a map of the great northern coal-field which accompanied the case.

7. From this map it appeared, as the fact was, that the Bedlington colliery is situate ten miles distant from the river Tyne by the nearest road: the distance by railway, however, is thirteen miles.

8. Before the making of the railways hereinafter mentioned, no coals raised from the Bedlington colliery, which is north of the river Blyth, had ever been exported from the river Tyne: but all coals raised from the Bedlington colliery before that time had been exported from the river Blyth, by discharging them from spouts on the north bank of the river Blyth into keels, and carrying them in such keels to ships lying in the harbour of Blyth, at the mouth of the river, such spouts being about a mile upon the river from such harbour.

9. Since the construction of the Blyth and Tyne Railway, some of the coals raised from the Bedlington colliery and the other collieries north of the river Blyth have been carried to the river Blyth, some to the river Tyne, and some to the river Wear, and have been thence exported, those to the river Wear having been carried there by the Blyth and Tyne and the North-Eastern railways: but none of such coals were sent to the Tyne before May, 1850.

*616] *10. The defendants, as lessees of the Bedlington colliery paid to the plaintiffs all dues for coals exported from that colliery from the river Tyne up to the 30th of September, 1860; but, from that date, they have refused to pay any further sums to the plaintiffs or their officers, on the alleged ground that they are not liable to pay the same, and that the previous payments made by them of the said dues had been made without their being liable to pay them.

11. The amount for which the verdict was given is admitted to be the sum due to the plaintiffs, if the defendants are liable to the payment of the dues under the 1 G. 4, c. liii., above mentioned.

12. The Blyth and Tyne and North Eastern railways are public railways.

13. The Bedlington colliery has no railway communication between the colliery and the river Tyne by any railway belonging to the owners of the colliery.

14. The coals so exported by the defendants from the river Tyne are taken from the colliery on to the Blyth and Tyne Railway, and by that railway down to the river Tyne, for which the defendants pay tolls to the railway company.

15. At the time of the passing of the 1 G. 4, c. liii., the greater

part of the coals exported from the river Tyne were shipped from keels; but this is now the exception, and not the general practice; and none of the coals on which the present claim arises were shipped from keels for which keelmen were required.

16. The owners or lessees of all collieries that were opened at the time of the passing of the 1 G. 4, c. liii., have regularly paid dues to the plaintiffs, when demanded, for all coals exported from such collieries from the river Tyne.

17. Two of the collieries so opened at the time of the passing of the 1 G. 4, c. liii., the Cowpen colliery, on *the north side, and [*617 the Rainton on the south side of the river Tyne, are situated about nine miles from the said river in a direct line: and the said Rainton colliery, and another colliery, the Pensher colliery, the owners of which have so paid dues, are situated on the south side of the river Wear.

18. The owners or lessees of Netherton, Ashington, and Framwellgate collieries, which have been opened since the passing of the said act, have regularly paid their dues, when demanded, on all coals exported from the said collieries: and such collieries are further distant from the Tyne in a direct line than the Bedlington colliery; Netherton and Ashington collieries being on the north side about twelve miles, and Framwellgate colliery on the south side being about eleven miles from the said river; and Netherton and Ashington collieries are both situated on the north side of the river Blyth.

19. The court was to be at liberty to draw all such inferences of fact as a jury might draw.

20. The question for the opinion of the court was, whether the plaintiffs were entitled to recover. If the court should be of opinion that they were, the verdict entered for the plaintiff was to stand; but, if the court should be of a contrary opinion, then the verdict was to be set aside, and a verdict entered for the defendants.

Mellish, Q. C. (with whom was *Udall*), for the plaintiffs.(a)—The question is, what is the proper *construction of the words [*618 “collieries or coal-mines near the river Tyne.” At the time of the passing of the act, the only mode of exporting coal from the district or coal-field in question was by bringing it by means of tramways from the collieries to the staiths where they were put into the keels; and all the colliery owners were assenting parties to the act. The railways and docks have now so entirely changed the state of things that the services of the keelmen are no longer needed. A construction can only be put upon the word “near” with reference to the surrounding circumstances which existed at the time the act was passed. It evidently intended to embrace all collieries whose owners availed themselves of the Tyne as a means of shipment. It is impos-

(a) The points marked for argument on the part of the plaintiffs were as follows:—

“1. That the facts stated in the case show that the defendants, as owners or lessees of the Bedlington colliery, are liable to pay dues to the plaintiffs, under the acts of parliament mentioned, of $\frac{1}{4}$ d. per chaldron on all coals exported by themselves from the river Tyne from such collieries, or sold to others and afterwards exported from the river Tyne:

“2. That the said dues are payable by the owners or lessees of any colliery for any coals exported from such colliery from the river Tyne; and that any colliery from which such coals are taken to be so exported, are, for such purpose, near the river Tyne, within the meaning of the statute under which such dues are payable.”

sible otherwise to draw the line: it cannot be limited to five or six miles or to nine or ten. The case finds that the Bedlington colliery is ten miles distant from the Tyne by the nearest road. The question was raised some years ago in a case in the Queen's Bench; but it ended in a compromise. One of the collieries in that case was distant from the Tyne three miles, the second nine miles, and the third fifteen miles: it was agreed that the first two were "near," and the guardians did not press their claim against the third. [ERLE, C. J.—If the legislature had intended to include all collieries from which coals were exported from the Tyne, why did they not say so? On the *619] other hand, if the intention was to provide a fund for *the sick and aged keelmen and their widows and children, what difference could it make whether the coals came from near or from afar?] It is only a mode of describing all the collieries.

Manisty, Q. C. (with whom was *T. Jones*), contra.(a)—It appears from the recital of the 1 G. 4, c. liii., that, in the year 1820, the colliery owners and lessees who were in the habit of shipping coals from the Tyne met and agreed to tax themselves for the charitable object mentioned. It was a just and proper thing that those who benefited by the services of the keelmen should thus provide for casualties amongst a useful and laborious class. But it is hardly just to impose the tax upon those who do not use those services: and probably if the net had been thrown so wide as the construction now contended for would spread it, the act might have received some opposition in parliament. To say that collieries which were not opened at the time of the passing of the act, and which neither create nor require the services of the keelmen, are to be charged, would certainly seem to be a very hard and absurd construction of the act. [WILLIAMS, J.—Where is the line to be drawn?] At all events, so *620] as to exclude those who at the time of the *passing of the 1 G. 4, c. liii., were not able to use the Tyne for the export of their coals. [BYLES, J.—*Primâ facie*, it would seem to mean all who were near enough to use the Tyne.] As they then used it. The only reasonable construction of the enacting part of the act, which is rather more precise than the preamble, would be to confine it to those who used the services of the keelmen: it never could have been intended to include those who at that time could not export from the Tyne. In the case referred to in the Queen's Bench, the colliery owners did use the services of the keelmen.

Mellish, Q. C., in reply.—The legislature evidently intended that all the coal-owners who exported coal from the Tyne should contribute to this fund. The state of things which now exists evidently was not contemplated or foreseen. The subject of these collections has recently been under the consideration of the legislature, who

(a) The points marked for argument on the part of the defendants were as follows:—

"1. That the colliery mentioned in the case is not upon or near the river Tyne, within the meaning of the 1 G. 4, c. liii.:

"2. That the defendants are not liable in respect of coals carried, sold, or delivered from the said colliery, because the same was not opened or worked until after the passing of the said act:

"3. That, at all events, the defendants are not liable under the act, both in respect of coals sold and delivered by them for exportation from the said river, and in respect of coals exported from the said river by the defendant himself."

have thought fit to continue them for a limited time.(a) It is but fair, therefore, that all the coal-owners should continue the payments for that period.

ERLE, C. J.—I am of opinion that the sum claimed by the plaintiffs in this case is lawfully due. The Bedlington colliery is, I think, near enough to the Tyne to *be within the enactment of the 1 G. 4, c. liii. The purpose for which the act was passed is evidently defeated by the lapse of time and alteration of circumstances. In the year 1820, all the colliery owners were obliged to avail themselves of the services of the keelmen in the shipping of their coals: and the legislature might well have considered it but just that this charitable fund should be supplied by contributions from those whose merchandise was exported with their aid. A change has happened, and the coals are now exported from the Tyne and other rivers in the district without calling in the assistance of the keelmen. The real object and purpose of the act has altogether passed away. We must, however, give effect to it according to its terms: and in terms it says that the guardians of the society of keelmen may demand and take of and from the owners or lessees of any collieries or coal-mines near the river Tyne, selling or delivering coals to be exported from or out of the said river, the sum of $\frac{1}{4}d.$ per chaldron for every such chaldron of coals so sold or delivered to be exported from or out of the said river, and which shall be so exported, to be collected at the offices or places where the contracts for the sale or delivery of such coals are usually made. The place of contract is the place for collecting. If the Tyne be used for the purpose of exporting the coals, the contribution is due, although the services in respect of which it was self-imposed are now no longer afforded: and I think a colliery which is ten miles off is "near the river Tyne," within the meaning of the act. [*621]

WILLIAMS, J.—I am of the same opinion. It is unnecessary to say whether or not Mr. Mellish is justified in the broad proposition which he laid down, that every colliery or coal-mine whence coals are exported *by the river Tyne is "near," within the meaning of this statute. A colliery which is ten miles off may well be considered near, within the words used. The word must necessarily be construed in different senses according to the subject-matter. [*622]

WILLES, J.—I am of the same opinion.

BYLES, J.—I am of the same opinion. The word "upon" in the preamble to the 1 G. 4, c. liii., does not mean literally *on* the river Tyne. And the word "near" is not a restraining, but an expanding word,—to be extended so far as to give effect to the intention of the legislature. Railways have brought places in one sense near to each other which were not so before the discovery of that rapid mode of transit. It is enough to say that I agree with the rest of the court in thinking that this colliery is near the river Tyne within the meaning of the act.

Judgment for the plaintiffs.

(a) The 24 & 25 Vict. c. 47, s. 6, enacts that "all rates, dues, duties, and imposts (thereinafter included in the term shipping-dues) leviable by any of the charitable authorities named in the first schedule annexed thereto," (amongst which is The Society of Keelmen on the River Tyne) "on ships or on goods carried in ships, shall, except so far as the same may be required for the execution of such shipping purposes as have hitherto been executed by means of the said dues, cease to be levied on and after the 1st of January, 1872."

THE GUARDIANS OF THE SOCIETY OF KEELMEN OF
THE RIVER TYNE v. ELLIOTT and Another. *June 2.*

See the head-note of the preceding case.

IN this case the defendants were the owners or lessees of three collieries, all lying between the river Tyne and the river Wear, viz. The Usworth colliery, the South Pearce or Oxclose colliery, and the Nettleworth colliery. The first of these is situate about *three* miles from the river Tyne, and about two miles from the river Wear; the second is situate about *four miles and three quarters* from the Tyne, *628] and about a mile and a half from the Wear; and the third is *situate about *nine* miles from the Tyne, and about three from the Wear.

The above and the following paragraph were the only statements in the case which at all varied it from Davison's Case, *antè*, p. 612:—

"The coal-field from which all the coals were wrought was not even won at the date of either of the said acts of parliament [28 G. 3, c. 59, and 1 G. 4, c. liii.]. When the said coal-field was first won, a road or tram-way was formed by the lessees for conveying the said coal to and shipping the same on the river Wear until under and by virtue of an act of parliament a public railway was formed through and adjoining the said coal-field; since which period the coals mentioned in this case have been brought by means of such public railway to and shipped on the river Tyne; other quantities of the coals raised from the said coal-field being still shipped on the river Wear."

The same counsel appeared for the respective parties in this as in the preceding case; but no argument took place.

ERLE, C. J.—The judgment in the former case applies to this case also. The collieries in question are locally nearer than in the other case, and must *à fortiori* be within the act.

Judgment for the plaintiffs.

*624] *BURGESS v. PEACOCK, Clerk to the Local Board of
Health of the District of BARNSELY. *June 11.*

The 34th section of the Local Government Act, 1858 (21 & 22 Vict. c. 98), which, after repealing the previous provisions on the subject in the Public Health Act, 1848 (11 & 12 Vict. c. 63), enacts that the local board may make by-laws, amongst other things, "with respect to the closing of buildings or parts of buildings unfit for human habitation, and to prohibition of their use for such habitation,"—"provided always that no such by-law shall affect any building erected before the date of the constitution of the district,"—does not authorize the local board to make such a by-law so as to affect premises erected prior to 1853, when the district was formed.

THE first count of the declaration stated that the plaintiff sued the defendant as clerk to the local board of health for the district of the township of Barnsley, in the west riding of the county of York,—for that the said local board, on or about the 18th of August, 1863, broke and entered the dwelling-house of the plaintiff, situate at Pogmoor, in the district of the said township of Barnsley, in the county aforesaid, and unlawfully procured and caused to be affixed in and upon a con-

spicuous part of the said dwelling-house a certain printed placard stating that the said dwelling-house was unfit for human habitation, and kept and continued the said placard affixed thereto for a long time, whereby the plaintiff was compelled to quit the said dwelling-house, and was put to great expense and inconvenience.

The second count stated that the said local board, on or about the 29th of August, 1863, broke and entered the said dwelling-house of the plaintiff, and ejected him therefrom, and hindered him from continuing to occupy the same, and the plaintiff had been and still was prevented from continuing to occupy the said dwelling-house by the said unlawful and illegal acts and proceedings of the said local board, and the said house had since, in consequence of the said acts and proceedings of the said local board, remained untenanted and uninhabited.

The defendant pleaded not guilty "by statute,"—the statutes referred to in the margin being, 11 & 12 Vict. c. 63, s. 139, 16 & 17 Vict. c. 24, ss. 1, 2, and 21 & 22 Vict. c. 98, s. 4.

*The cause was tried before Blackburn, J., at the last assizes at York, when the facts which were proved or admitted were [*625 as follows:—

The district of Barnsley was created by a provisional order of the general board of health, dated the 9th of November, 1852, which was confirmed by the 16 & 17 Vict. c. 24, passed on the 9th of May, 1853.

By the 4th section of the Local Government Act, 1858, it is enacted that "this act shall be construed together with and be deemed to form part of the Public Health Act, 1848 (11 & 12 Vict. c. 63): words used in this act shall be interpreted in the sense assigned to them in the said Public Health Act: by-laws framed under this act shall be subject to confirmation, enforced, and dealt with in all other respects as by-laws under the said Public Health Act: and the provisions of each of the said acts shall, so far as may be consistent with the provisions of this act, respectively be applicable to all matters and things arising under the other act." And s. 34, which repeals the 53d and 72d sections of the Public Health Act, 1848, enacts as follows:—"Every local board may make by-laws with respect to the following matters, that is to say,—1. with respect to the level, width, and construction of new streets, and the provisions for the sewerage thereof,—2. with respect to the structure of walls of new buildings, for securing stability and the prevention of fires,—3. with respect to the sufficiency of the space about buildings, to secure a free circulation of air, and with respect to the free ventilation of buildings,—4. with respect to the drainage of buildings, to water-closets, privies, ash-pits, and cess-pools, in connection with buildings, and *to the closing of buildings or parts of buildings unfit for human habitation, and to prohibition of their use for such habitation*: And they may further provide for the observance of the same by *enacting therein such [*626 provisions as they think necessary as to the giving of notices, as to the deposit of plans and sections by persons intending to lay out streets or to construct buildings, as to inspection by the local board, and as to the power of the local board to remove, alter, or pull down any work begun or done in contravention of such by-laws: provided always, that no such by-laws shall affect any building erected before

the date of the constitution of the district. But, for the purposes of this act, the re-erecting of any building pulled down to or below the ground-floor, or of any frame-building of which only the frame-work shall be left down to the ground-floor, or the conversion into a dwelling-house of any building not originally constructed for human habitation, or the conversion into more than one dwelling-house of a building originally constructed as one dwelling-house only, shall be considered the erection of a new building."

The local board of Barnsley made certain by-laws pursuant to the power for that purpose vested in them by the Public Health Act, 1848, which were duly confirmed by the Home Secretary on the 31st of March, 1860. The 27th of these was as follows:—

"In any case where it is certified to the local board of health by the officer of health of the district, if any, by the surveyor, by the inspector of nuisances, or by any two medical practitioners, that any building or part of a building is unfit for human habitation, the local board of health may, by their order affixed conspicuously on the building or part of the building, declare that the same is not fit for human habitation, and shall not, after a date to be therein specified, be inhabited; and any person who after the date mentioned in such order lets or occupies, or continues to let or occupy, or knowingly *627] suffers to be occupied *such building or part of a building, shall be liable for every such offence to a penalty not exceeding 20s. for every day during which the same is so let or occupied: Provided always, that, if at any time after such order made the local board of health shall be satisfied that such house has become or rendered fit for human habitation, they may revoke their said order, and the same shall thenceforth cease to operate."

A meeting of the local board was held on the 23d of June, 1863, when a resolution was passed directing the officer of health to inspect the plaintiff's house and report to them as to its condition. The officer, having made his inspection, reported to the board that the premises were unfit for human habitation. On the 21st of July, the board resolved to give the proper order under the by-law above set out; and, at a subsequent meeting of the board, viz. on the 18th of August, the following notice was signed and sealed by them, and was on the same day affixed on the outer door of the plaintiff's dwelling-house:—

"Barnsley Local Board of Health.

"Whereas, our officer of health has certified to us in writing that the dwelling-house situate at Pogmoor, within the district of the township of Barnsley, in the county of York, belonging to George Wike, and in the occupation of Samuel Burgess, is unfit for human habitation: Now we, the said local board of health for the said district, do by this order, affixed conspicuously on the said dwelling-house, declare that the same is not fit for human habitation, and that the same shall not be inhabited after the 29th day of August instant:—

"And we do hereby give notice that any person who, after the said 29th day of August instant, lets or occupies, or continues to let or occupy, or knowingly suffers to be occupied the said dwelling-house, will be liable to a penalty not exceeding 20s. for every day during

*which the same dwelling-house shall be so let or occupied." [*628]

The dwelling-house in question was erected long before the year 1853, when the local board of health for Barnsley was constituted, and had not since been re-erected.

It was admitted, on the part of the plaintiff, that, if the by-law in question, as applied to a building erected before the constitution of the district, gave power to the local board to do as they did, all their proceedings were regular,—with this exception, that, before ordering the placard (notice) to be stuck up, or sticking it up, the board should have given the plaintiff notice and an opportunity of being heard. But it was insisted that the by-law only applied to new buildings.

For the defendants it was contended that the board had power to make the by-law in question, and that it had been properly enforced.

The learned judge nonsuited the plaintiff, giving him leave to move to enter a verdict for 5*l.* 5*s.* if the court, drawing such inferences of fact as a jury might draw, should be of opinion that the statute and the by-law afforded the local board no justification for the act complained of.

Overend, Q. C., in Easter Term, obtained a rule nisi to enter a verdict for the plaintiff, with 5*l.* 5*s.* damages, on the grounds,—“first, that the by-law of the local board of health of Barnsley did not justify the breaking and entering the dwelling-house of the plaintiff,—secondly, that the power of making by-laws under the 34th section of the Local Government Act, 1858, as to closing buildings for human habitation, did not extend to buildings erected before the date of the constitution of the district,—thirdly, that the local board had no authority to enforce the by-law without first giving [*629] *notice to the plaintiff, and affording him an opportunity of being heard. He referred to *Cooper v. The Wandsworth Board of Works*, 14 C. B. N. S. 180 (E. C. L. R. vol. 108).

Manisty, Q. C., and *Kemplay*, now showed cause.—Two questions arise upon this rule,—1. whether a by-law made by the local board of health of this district, under the authority of the 34th section of the Local Government Act, 1858, with regard to the condemnation of buildings found to be unfit for human habitation, can have reference to buildings which were erected before the district was constituted,—2. assuming that it can, whether it was incumbent on the local board to give the occupier notice before they affixed the placard upon the house. The 34th section of the 21 & 22 Vict. c. 98 begins with repealing the 53d and 72d sections of the Public Health Act, 1848, to which it may not be immaterial to refer. The 53d section of that act required notice to be given to the local board before the commencement of any new building; and the 72d required notice to be given before beginning to lay out any new street. In lieu of these two sections, the 34th section of the 21 & 22 Vict. c. 98 enacts that the local board may make by-laws with respect to four several matters,—1. the level, width, and construction of *new streets*, and the provisions for the sewerage thereof,—2. the structure of walls of *new buildings*, &c.,—3. the sufficiency of the space about buildings, to secure a free circulation of air, and the ventilation of buildings,—4. the drainage of buildings, water-closets, &c., and the closing of buildings or parts

of buildings unfit for human habitation, and the prohibition of their use for such habitation. Then it goes on, "and they may further provide for the observance of the same, by enacting therein such provisions as they think necessary;—as to the giving of notices,—as to *630] the deposit of plans and sections by persons intending to lay out streets or to construct buildings,—as to inspection by the local board,—and as to the power of the local board to remove, alter, or pull down any wall begun or done in contravention of such by-laws." Then comes this proviso,—“provided always that no such by-law shall affect any building erected before the date of the constitution of the district.” This by-law was made under the supposed authority of the 4th clause of s. 34: and the question is, whether such a by-law can be made to apply to a building erected before the constitution of the district under the 16 & 17 Vict. c. 24. One of the most important objects of the statute would be frustrated if it were held that the local board have not power to prohibit the occupation as dwelling-houses of premises which are unfit for human habitation. It is a provision which is peculiarly applicable to old houses. “Such by-law,” in the proviso, must mean a by-law referring to the special provision next immediately preceding, viz. the removal, alteration, or pulling down any work begun or done in contravention of the by-laws. This provision is not in terms confined to new buildings, and it is in its nature more applicable to old structures. [WILLIAMS, J.—It is difficult to say that the first three clauses apply to old buildings.] The first and second apply to new streets and buildings; but the third and fourth are more general. [WILLIAMS, J.—Suppose the local board made a by-law declaring that no alley shall be less than six feet wide. That might very properly be ordered as to *new* structures, but not as to old ones.] In *Shiel, app., The Mayor &c. of Sunderland, resp., 6 Hurlst. & N. 796*, a by-law made by a local board of health pursuant to this section directed that “every building to be erected and used as a dwelling-house shall have an open space exclu- *631] sively belonging thereto, to the extent of at least one-third of the entire area of the ground on which the said dwelling-house shall stand, and which shall belong thereto,” &c. By the 21 & 22 Vict. c. 98, s. 34, no by-law shall affect any building erected before the date of the constitution of the district, but the re-erecting of any building pulled down to or below the ground-floor, or the conversion into a dwelling-house of any building not originally constructed for human habitation, shall be considered the erection of a new building. The proprietor of a house which had been erected before the constitution of the district, and was used as an hotel, having a yard with coach-house and stables in the rear, for the purpose of making an addition to the hotel, pulled down the coach-house and stables below the ground-floor, and erected upon the same site a building three stories high,—the only means of access to the upper chambers being by going up the staircase of the old house and through a passage into the new building. On an information against the proprietor for an offence against the by-law, in not leaving an open space equal to one-third of the area of the ground on which the dwelling-house, &c., stood, the justices found that the building erected in the yard, being a new building built up to and adjoining the old building, must

either be considered with the old building as one house, or that the old house and new building must be considered as two erections, and that both old and new buildings must be considered in reckoning the ground upon which the building stood; and they convicted him of a breach of the by-law: it was held that the conviction could not be sustained, because the new erection was not a new dwelling-house, but merely an addition to an old dwelling-house. "It is reasonable," says Bramwell. B., "when people are laying out new streets, to say that they shall lay them out in a *particular manner; but it is a very different thing to say that people whose property has been laid out long ago shall only make a particular use of it." [*632]

Overend, Q. C., *Field*, Q. C., and *Maule*, in support of the rule.—The repealed provisions of the 11 & 12 Vict. c. 63 were entirely prospective. The substituted provisions in the 21 & 22 Vict. c. 98, s. 34, were evidently intended to be prospective also. The 1st and 2d clauses in terms apply to new buildings; the 3d can hardly apply to old buildings; the 4th might perhaps, but for the proviso that "no such by-law shall affect any building erected before the date of the constitution of the district." That proviso is to be read as a limitation on that which is before expressed. The building in question was about one hundred years old. Provisions of this sort, which interfere with common-law rights, and give a new jurisdiction to local boards, are to be construed very strictly, to prevent usurpation and abuse. The 49th section of the Public Health Act, 1848, which related to drains, &c., and is unrepealed, was expressly confined to newly-erected houses or to houses rebuilt.

ERLE, C. J.—I am of opinion that the 27th by-law made by the local board of health of Barnsley constituted no defence to the trespasses charged, and therefore that the plaintiff is entitled to have a verdict entered for him pursuant to the reservation at the trial. The plaintiff's house was erected long before Barnsley was constituted a district under the Public Health Act. The by-law under which the defendant acted provides for the case of buildings which are found to be unfit for human habitation: and it is based upon the power given to the local board by the 34th section of the Local Government Act, 1858, to make by-laws *with respect, amongst other things, to "the closing of buildings or parts of buildings unfit for human habitation, and to prohibition of their use for such habitation." [*633] These wide words would undoubtedly authorize the by-law in question; but they are followed by a proviso that "no such by-law shall affect any building erected before the date of the constitution of the district." Giving effect to the plain words of the enactment conferring the authority, and of the proviso, it seems to me that the local board had not the power to make a by-law which would enable them to order the closing of an old building, erected before the constitution of the district, and not since rebuilt. I was very much pressed by a scruple, lest, in putting the construction upon the statute which I am doing, I should be obstructing the operation of a sanitary provision, which, if carried out with fairness and discretion, must undoubtedly have a very beneficial effect upon the health and morals of the inhabitants of densely populated districts: and I am anxious not to limit or embarrass the powers which the legislature has thought fit to intrust

to local boards. I have therefore looked anxiously to see if the language of the statute is such as to compel me to come to this conclusion. My scruple has, however, been in a great degree removed because I find many provisions in the act giving the board power to prevent or to remove nuisances, besides the powers already existing at common law. I think also the legislature might well be supposed to be slow to take away or abridge the vested rights of the owners of property. The provision in question was intended, as it seems to me, to apply to all newly-erected premises within the district: but, in the case of those who have invested their capital in building there before these new arrangements came into existence, it would seem unjust to *634] give the local *board authority to interfere with them. The local board are empowered to make by-laws with respect to the space about buildings, and their ventilation. In the case of a building erected after the constitution of the district, the local board may reasonably have power to interfere if the structure is not fit in these respects. But it would be a very considerable interference with vested rights, to hold that they may exercise the same control over buildings which were there before. I am very much confirmed in this view by the fact that similar provisions are contained in the two sections of the 11 & 12 Vict. c. 63 which are repealed, and that in the new legislation which enables the local board to make by-laws upon the subject, there is the express proviso I before adverted to, that no by-law made under the authority of that statute shall affect any building erected before the date of the constitution of the district. The words are general: and I have arrived at the clear conclusion that it was intended to limit the general authority of the local board to make by-laws, and that consequently the by-law in question does not apply to the plaintiff's house.

WILLIAMS, J.—I am of the same opinion. I do not express any opinion as to whether the powers of the local board ought to have been extended further than they have been. But, construing the enactment as it stands, I think the local board clearly had no power to make a by-law so as to affect premises which were in existence before the date of the constitution of the district. That seems to me to be the natural result of the ordinary grammatical construction of the words of the 21 & 22 Vict. c. 98, s. 34. It begins by enacting that every local board may make by-laws with respect to four several matters which are separately enumerated. It then goes on to say that *635] they may further *provide for the observance of those by-laws by enacting therein such provisions as they think necessary as to the giving of notices, &c.; and then this part of the section concludes with a proviso that “no such by-law,”—that is, upon the subject of any of the four heads before mentioned,—“shall affect any building erected before the date of the constitution of the district.” If the defendant's contention, that this proviso applies only to the special provision next immediately preceding, were correct, it would leave the third and fourth classes of by-laws to apply to all buildings whether erected before or after the date of the constitution of the district. I agree with my Lord that such a power would be a very harsh one to confer upon the board. Further, if the defendant's contention be correct, the proviso would be useless, not to say senseless;

for, all those provisions must from their nature refer to matters which must arise after the district is formed, and therefore the proviso is not needed. I can very well understand why it was introduced, if the plaintiff's contention be the true one.

WILLES, J., concurred.

BYLES, J.—Seeing that the clause in question is a substitution for two clauses in the former act which applied only to new buildings, I think we are warranted in giving the words here used their natural construction, by holding that the power of the local board to make by-laws is confined to such by-laws as shall apply exclusively to buildings erected (or altered) since the date of the constitution of the district under the Public Health Act. Rule absolute.(a)

(a) See *Tinkler v. The Wandsworth District Board*, 27 Law J., Ch. 342.

*O'FLANAGAN v. GEOGHEGAN. June 9. [*636

The 17 & 18 Vict. c. 34, is not available to compel the attendance of a person in Ireland as a witness before one of the Masters of this court upon a compulsory reference under the Common Law Procedure Act, 1854.

THE 17 & 18 Vict. c. 34, recites that "great inconvenience arises in the administration of justice from the want of a power in the superior courts of law to compel the attendance of a witness resident in one part of the united kingdom at a trial in another part, and the examination of such witnesses by commission is not in all cases a sufficient remedy for such inconvenience," and enacts (s. 1) that, "if in any action or suit now or at any time hereafter depending in any of Her Majesty's superior courts of common law at Westminster or Dublin, or in the Court of Session or Exchequer in Scotland, it shall appear to the court in which such action is pending, or, if such court is not sitting, to any judge of any of the said courts respectively, that it is proper to compel the personal attendance at any trial of any witness who may not be within the jurisdiction of the court in which such action is pending, it shall be lawful for such court or judge, if in his or their discretion it shall so seem fit, to order that a writ called a writ of subpoena ad testificandum or of subpoena duces tecum or warrant of citation shall issue in special form, commanding such witness to attend such trial wherever he shall be within the united kingdom; and the service of any such writ or process in any part of the united kingdom shall be as valid and effectual to all intents and purposes as if the same had been served within the jurisdiction of the court from which it issues."

Jones moved for an order under the above statute upon a witness in Ireland to attend before the Master as a witness upon a reference under the compulsory *clauses of the Common Law Procedure Act, 1854. [*637
[WILLES, J.—Is a subpoena the proper process for that purpose? The mode of compelling the attendance of a witness before an arbitrator, is, by a judge's order under Baron Parke's Act, 3 & 4 W. 4, c. 42, s. 40; and I presume that would be the proper process for bringing a witness before the Master on a reference.

The act under which you move and the second Common Law Procedure Act were passed during the same session of parliament: but the framers of the one act were altogether ignorant of what was being done by the framer of the other. The second Common Law Procedure Act seems only to be addressed to amending the mode of referring cases to arbitration: it contains nothing to show an intention to alter the process to compel the attendance of witnesses upon compulsory references before the Master. You are asking for an order: but the only process which the statute under which you apply contemplates, is, a writ of subpoena to compel the attendance of the witness at a *trial*.]

PER CURIAM.—We think the application now made is not authorized by the statute 17 & 18 Vict. c. 34. Rule refused.

***638]** ***EYRE and Another v. ARCHER.** *June 9.*

A deed in the form given in Schedule D. to the Bankruptcy Act, 1861 (though duly executed and registered), cannot be pleaded in bar to an action against the debtor by a creditor who has assented to and executed the same, for a debt in respect of which such creditor has so assented.

THIS was an action for work and labour as attorneys, and for disbursements and moneys due upon accounts stated.

Plea,—that, after the accruing of the causes of action, and after the coming into force of the Bankruptcy Act, 1861, and before suit, the defendant being indebted to divers persons in divers sums of money, and being unable to pay the same, the defendant and certain persons, to wit, one S. Freeman and one J. E. Chapman, as trustees as hereinafter mentioned, did make and enter into a certain deed in such form as is expressed in Schedule D. to the said act annexed, relating to the debts and liabilities of the defendant as such debtor, and the distribution, management, and winding-up of his estate, and his release therefrom, and which deed was made between the defendant and the said S. Freeman and J. E. Chapman on the behalf and with the assent of the plaintiffs and certain other creditors of the defendant, and which said deed the plaintiffs also undersigned as such creditors, and by which said deed the defendant conveyed all his estate and effects to the said S. Freeman and J. E. Chapman absolutely, to be applied and administered for the benefit of the creditors of the defendant in like manner as if the defendant had been at the date of the said deed duly adjudged bankrupt: That the defendant did, after the accruing of the causes of action to which that plea was pleaded, and before the commencement of the suit, that is to say, on the 3d of May, 1862, duly execute the said deed, and that his execution thereof was and is attested by an attorney and solicitor, and that the said trustees duly
***639]** executed the same, and the majority in number representing three-fourths in value of the defendant's said creditors whose debts respectively amounted to 10*l.* and upwards did in writing assent to or approve of the said deed, and the plaintiffs, being such creditors as aforesaid, did also undersign the said deed as such creditors of the defendant; and that twenty-eight days from the day of

the execution of the said deed by the defendant, to wit, on the 30th of May, 1862, the same was produced and left (having been first, and the same was before the registration thereof, duly stamped with and bore such ordinary and ad valorem stamp-duties as in and by the said act were and are in that behalf required,) at the office of the chief registrar in the said act in that behalf mentioned, for the purpose of being, and the same was within the said twenty-eight days, to wit, on the day and year in that behalf before mentioned, duly registered according to the said act; and that, together with the said deed, there was delivered to the said chief registrar an affidavit by the defendant, as and being such debtor, that such a majority as in this behalf afore-said had by writing assented to or approved of the said deed as afore-said, and which said affidavit also stated the amount in value of the property and credits of the defendant, as and being such debtor, comprised in the said deed: That, immediately after the execution of the said deed by the defendant (being such debtor), possession of all the property comprised in the said deed of which the defendant could give or order possession, was given to the said trustees: That the said deed contained all such things as were necessary to make the same, and the same was a trust deed for the benefit of the defendant's creditors within the meaning of the said act; and that everything had happened and been done by the defendant and the said trustees and his said creditors *necessary to make the said deed, [*640 and the same was, as valid, effectual, and binding on all the defendant's creditors as if they were parties to and had duly executed the same; and that the plaintiffs were proceeding in this action for and on account of and to recover and enforce against the defendant, in breach of the said deed, certain debts and demands, being the causes of action to which this plea was pleaded,(a) in respect of which the plaintiffs were entitled to have the benefit of the provisions of the said deed.

To this plea the plaintiffs demurred, the ground of demurrer stated in the margin being, "that a deed in the form expressed in Schedule D. to the Bankruptcy Act, 1861, cannot be pleaded in bar to an action against the debtor executing such deed, by a creditor who has assented to and undersigned the same, for the debt in respect of which such creditor has so assented." Joinder.

Archibald, in support of the demurrer.—The deed in question is no bar to the action. It contains no release: it is nothing more than an assignment for the benefit of creditors, and therefore is not pleadable in bar: *Tabor v. Edwards*, 4 C. B. N. S. 1 (E. C. L. R. vol. 93); *Legge v. Cheesebrough*, 5 C. B. N. S. 741 (E. C. L. R. vol. 94). [BYLES, J.—The question is, whether s. 200, with the surrounding circumstances, makes this deed operate as a bar.] It purports to be a deed executed pursuant to s. 200; but there is no averment that the notices were given as required by that section: it must therefore be taken to have the same effect as a deed under s. 192 which contains no release. The 192d section enacts that "every deed or instrument made or entered into between a debtor and his creditors, or any of them, or *a trustee on their behalf, relating to the debts or liabilities of the debtor, and his release therefrom, or the distri- [*641

(a) The plea was pleaded with an exception as to a small sum paid into court.

bution, inspection, management, and winding up of his estate, or any of such matters, shall be as valid and effectual and binding on all the creditors of such debtor as if they were parties to and had duly executed the same," provided certain conditions be observed. And a 197 enacts, that, after the registration of such deed, "the debtor and creditors and trustees, parties to such deed, or who are bound thereby, shall in all matters relating to the estate and effects of such debtor be subject to the jurisdiction of the Court of Bankruptcy, and shall respectively have the benefit of and be liable to all the provisions of this act, in the same or like manner as if the debtor had been adjudged a bankrupt, and the creditors had proved, and the trustees had been appointed creditors' assignees under such bankruptcy;" and that, "except where the deed shall expressly provide otherwise, the court shall determine all questions arising under the deed according to the law and practice in bankruptcy, so far as they may be applicable, and shall have power to make and enforce all such orders as it would be authorized to do if the debtor in such deed had been adjudged bankrupt, and his estate were administered in bankruptcy." There is no difference in this respect between the provisions of the 11 & 12 Vict. c. 106 and those of the Bankruptcy Act, 1861. The proper course would probably be that adopted in *Woodward v. Meredith*, 2 D. & L. 135. Under s. 182, proof of a debt operates as an election: but it is not pleadable in bar.

Hannen, contra.—The form given in the schedule must be adopted where the debtor is compelled to avail himself of the 200th section. It is true the deed does not in terms purport to be a release: but the *642] *legislature say it shall be *sufficient*. [BYLES, J.—Sufficient for what?] For all the purposes of the act. Looking at s. 198, it is plain that this was intended to operate as a discharge. The court will give it a reasonable effect: and at all events it must operate as a new contract as between the debtor and those creditors who execute the deed. To hold that it cannot be pleaded in bar, will be depriving it of all effect. A deed under the other sections has no operation as a bar to an action by a non-executing creditor; but it is binding on those who do execute: *Norman v. Thompson*, 4 Exch. 755. In *Good v. Cheesman*, 2 B. & Ad. 328 (E. C. L. R. vol. 22), a debtor being unable to meet the demands of his creditors, they signed an agreement (which was assented to by the debtor) to accept payment by his covenanting to pay two-thirds of his annual income to a trustee of their nomination, and give a warrant of attorney as a collateral security. The creditors never nominated a trustee, and the agreement was not acted upon, and one of the creditors brought an action against the debtor for his demand. The debtor appeared to have been always willing to perform his part of the agreement: and it was held that the agreement, though not properly an accord and satisfaction, was still a good defence on the general issue, as it constituted a valid new contract between the creditors and the debtor, capable of being immediately enforced, and the consideration for which to each creditor was the forbearance of the rest, and as there appeared no failure of performance on the part of the debtor. "Is not this," said Lord Ellenborough, "a case where each creditor is bound in consequence of the agreement of the rest? It appears to

me that it is so both on principle and on the authority of the cases in which it has been held that a creditor shall not bring an action, where others have been induced to join him in a *composition [*643 with the debtor; each party giving the rest reason to believe that, in consequence of such engagement, his demand will not be enforced. This is, in fact, a new agreement substituted for the original contract with the debtor; the consideration to each creditor being the engagement of the others not to press their individual claims." [WILLIAMS, J.—This is not pleaded as an accord and satisfaction. WILLES, J.—Is not the great difficulty under s. 197,(a) which seems to assume that everything is to go on as if there had been an adjudication in bankruptcy, and as if the trustees were assignees in bankruptcy? If so, there is no release of the debt until the final order of *dis- [*644 charge. If s. 197 does not include such a case, then, if the debtor is discharged at all, it must be at the time of the execution of the deed. Everything is taken out of him, and vested in the trustees. Unless a further process is contemplated, there is no date at which he becomes discharged, if not at the date of the deed.] He clearly has no means of obtaining his discharge in bankruptcy. [ERLE, C. J.—May there not be an order of discharge under s. 197?] It is submitted not. Under s. 198, there may be protection, as in bankruptcy: but that is no discharge. The judgment might be registered: *Fluester v. M'Clelland*, 8 C. B. N. S. 357. [WILLIAMS, J.—Is not a deed under s. 200 in the same position as a deed under s. 192 which contains no release?] Not as to the debtor's discharge, it is submitted. The following sections of the Bankruptcy Act, 1861, were also referred to, viz. 140, 157, 158, 159, 160, 161.

ERLE, C. J.—I am of opinion that this plea is bad. The defendant relies upon a deed in the form given by the Bankruptcy Act, 1861, s. 200, and schedule D. That section enacts, that, "if a debtor cannot obtain the assent of a majority in number representing three-fourths in value of his creditors, by reason of his being unable to ascertain by whom bills of exchange, promissory notes, or other negotiable securities, accepted, drawn, made, or endorsed by him are holden, or by reason of the absence of creditors in a foreign country, or other similar circumstances, *it shall be sufficient* if he obtain the consent of a majority in number representing three-fourths in value

(a) Which enacts, that, "from and after the registration of every such deed or instrument in manner aforesaid, the debtor and creditors and trustees parties to such deed, or who have assented thereto or are bound thereby, shall in all matters relating to the estate and effects of such debtor be subject to the jurisdiction of the Court of Bankruptcy, and shall respectively have the benefit of and be liable to all the provisions of this act, in the same or like manner as if the debtor had been adjudged a bankrupt, and the creditors had proved, and the trustees had been appointed creditors' assignees under such bankruptcy; and the existing or future trustees of any such deed or instrument, and the creditors under the same, shall as between themselves respectively, and as between themselves and the debtor and against third persons, have the same powers, rights, and remedies with respect to the debtor and his estate and effects, and the collection and recovery of the same, as are possessed or may be used or exercised by assignees or creditors with respect to the bankrupt, or his acts, estate, and effects in bankruptcy; and, except where the deed shall expressly provide otherwise, the court shall determine all questions arising under the deed according to the law and practice in bankruptcy, so far as they may be applicable, and shall have power to make and enforce all such orders as it would be authorized to do if the debtor in such deed had been adjudged bankrupt, and his estate were administered in bankruptcy."

of all his other creditors to such deed or instrument. as aforesaid; provided that notice shall have been inserted by or on behalf of the debtor in one or more newspapers published in the county or place *645] at which he shall *have carried on business immediately prior to the date of such instrument, requiring his creditors to signify their assent to or dissent from such deed or instrument, by notice in writing addressed to the trustee or trustees thereof within fourteen days from the insertion of such notice, and that the affidavit or certificate of the trustee or trustees shall state the circumstances of the case, and the same shall be allowed by the court, and provided the deed or instrument be in such form as is expressed in schedule D. to this act annexed, which shall vest all the estate and effects of the debtor in the trustees of such deed, and provided that all such other conditions as are hereinbefore required be duly complied with." The form of deed given in the schedule contains no release. The question is, whether the words "it shall be sufficient" make the deed operate as a bar to any action which any creditor may choose to bring. The 200th section comes in a chapter or division of this much-discussed statute, beginning with s. 192, which relates to arrangements by deed for the benefit of creditors. Now, a deed under s. 192 has been held not to operate as a bar, unless it contains a release. Certain things may be done which may make the deed operate as a stay of execution under s. 198. But I desire cautiously to confine my judgment in this case to saying that this deed is not pleadable as a bar to the action. It gives the debtor the same rights, and no more, as he would have under a deed under s. 192 which contains no release.

The rest of the court concurring,

Judgment for the plaintiffs.

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*MEYER v. DRESSER. May 6.

1. The consignee of goods under a bill of lading, has no right to deduct from the freight payable on delivery of goods the value of articles which, though mentioned in the bill of lading, turn out not to have been put on board.

2. *Semble*, that evidence of a usage to that effect would not be admissible.

3. The 3d section of the Bills of Lading Act, 18 & 19 Vict. c. 111, does not make the bill of lading conclusive evidence against the owner that the goods were put on board.

4. The statute operates where the bill of lading is signed by the master who is part-owner, and who sues on behalf of himself and his co-owners.

5. A. orders a cargo of timber of B. at M., with directions to charter a ship to bring it to London. B. accordingly charters a ship and sends the bill of lading endorsed to A. with a draft for the invoice price, which A. accepts and pays:—*Semble*, that A. is a "consignee or endorsee for valuable consideration," within the meaning of the 3d section of the Bills of Lading Act.

THIS was an action for freight on a charter-party and bill of lading, against the endorsee of the bill of lading.

The first count of the declaration stated, that, after the 14th of August, 1855, certain persons in parts beyond the seas, to wit, Messrs. Schultz & Co., at Memel, delivered to the plaintiff certain goods, to wit, certain timber and wood, to be by the plaintiff carried and conveyed in a certain ship of the plaintiff from Memel to London under a certain bill of lading signed for the same by the plaintiff, and there

delivered (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the sea, rivers, and navigation, of whatever nature and kind soever, save risk of boats so far as ships are liable thereunto, excepted) unto the order of the said persons or to their assigns, he or they paying freight for the said goods and other conditions as per charter-party, with primage and customary average: Averment, that afterwards, and after the said 14th of August, 1855, the said persons endorsed the said bill of lading to the defendant, in order to pass the property in such goods to the defendants; and that thereupon, and by reason of such endorsement, the property in the said goods passed to the defendant: that, by the charter-party referred to in the said bill of lading, freight is made payable at certain rates therein specified, and is made payable on the delivery of the cargo, one-half in cash, and the remainder by good and approved bills on London at three *months date: that, before this suit, all conditions were fulfilled and all things were done and had happened, [*647 and all times elapsed, necessary to entitle the plaintiff to have the freight, primage, and average paid by the defendant according to the terms of the said bill of lading and charter-party, and to sue the defendant for the non-payment thereof thereof thereafter mentioned: yet that the defendant made default in paying the freight, primage, and average for the carriage of the said goods, according to the said bill of lading and charter-party; and that, although he paid the plaintiff a portion of the freight, primage, and average payable for the carriage of the said goods, yet the defendant made default in paying the plaintiff the residue of the said freight, primage, and average, amounting to a large sum, to wit, the sum of 85*l.* 0*s.* 3*d.*, whereby the plaintiff had not only lost the sum so due to him as aforesaid, but the use and interest of the money payable for the same.

The declaration also contained counts for money agreed to be paid in consideration of the plaintiff giving up the goods without demanding payment of freight,—for hire of a ship,—and for money paid, &c.

Pleas, to the first count,—first, that, by the charter-party, the freight was not made payable as alleged,—secondly, non-delivery of the goods; and to the rest of the declaration, except as to 43*l.* 18*s.* 8*d.*, parcel, &c., payment, and as to the residue never indebted, and as to 43*l.* 18*s.* 8*d.*, payment into court. Issue thereon.

The cause was tried before Erle, C. J., at the sittings in London after Hilary Term last. The facts were as follows:—The plaintiff was master and part-owner of a Prussian ship called the Rhea, two-thirds of which belonged to two other persons; and in July, 1863 entered into a charter-party with Messrs. Schultz & Co., of Memel, to carry for them a cargo of timber to *London. The timber [*648 had been bought by Schultz & Co. as agents of Dresser, who is a timber-merchant in London, and they chartered the Rhea to carry it to London. The charter-party contained the following stipulations,—“On proper, true, and faithful delivery of the cargo agreeable to bills of lading, the captain has to receive freight on same as follows.” “The captain or owner pledges the ship with all her furniture and freight, the freighter the cargo, one to the other, firmly by these

presents, as special security, the latter only the cargo: it being agreed and understood, that for payment of all freight and demurrage, the captain shall have an absolute lien and charge on the said cargo." "Both parties make themselves liable for the true and faithful performance of this agreement, removing all and every objection or pretext contrary thereto whatever, and in witness whereof confirm it throughout by their respective signatures written in their own handwriting." Bills of lading were prepared by Schultz & Co., and signed by the plaintiff, giving a detailed account of the timber shipped, including 600 pieces of oak barrel-staves, and were endorsed to Dresser. The vessel sailed for London on the 16th of August, and arrived on the 14th of September. Upon the discharge of the cargo, it was discovered that the 600 oak barrel-staves were not on board,—they never having in fact been shipped. The defendant therefore insisted upon deducting their value (41*l.* 1*s.* 6*d.*) from the freight due upon the bills of lading.

On the part of the defendant, witnesses were called to prove that it was the invariable custom to deduct from the freight payable the value of any missing goods; and one of them, Dr. Zimmerman, who had been judge of an inferior court in Prussia, stated, that, according to the Prussian law, the bill of lading was conclusive as to the goods *649] being on board (articles *653, 654, 655 of the Prussian Code), and that the assignee of a bill of lading had all the rights of the original shipper: articles 452–478. The defendant himself also stated that the alleged usage was not confined to the timber trade, but that it prevailed in every trade and in every place. This evidence was admitted, subject to the plaintiff's objection.

One of the plaintiff's witnesses stated that it was usual to deduct from freight any claim which the receiver of the cargo might have in respect of goods shipped but not delivered; but he denied that there was any such usage applicable to the case of goods inserted in the bill of lading, but not actually shipped.

For the plaintiff it was submitted that there was nothing to take this case out of the ordinary rule, and therefore that he was entitled to recover.

For the defendant it was insisted that the custom sworn to by himself and his witnesses entitled the defendant to deduct the value of the missing staves; and reliance was also placed upon the 3d section of the Bills of Lading Act, 18 & 19 Vict. c. 111, which enacts that "every bill of lading in the hands of a consignee or endorsee for valuable consideration representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not been in fact laden on board: Provided that the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or some person under whom the holder claims."

The jury negatived the custom relied on by the *defendant, and returned a verdict for the plaintiff for 37*l.* 6*s.*, leave [*650 being reserved to the defendant to move to enter a verdict for him.

Manisty, Q. C., accordingly, on a former day in this term, obtained a rule calling upon the plaintiff to show cause "why the verdict found for him as to so much of the issue raised by the second plea as relates to the 600 pieces of timber not delivered, and also as to the issues raised by the third and fourth pleas, should not be set aside, and instead thereof a verdict be entered thereon for the defendant, pursuant to leave reserved, on the ground, that, by virtue of the undisputed usage in case of goods shipped but not delivered, coupled with the charter-party and bill of lading, and the act of 18 & 19 Vict. c. 111, the defendant was entitled to have the value of the missing goods deducted from the freight payable by the defendant in respect of the goods delivered; and upon the ground, that, according to the law of Prussia, the plaintiff was bound to make that deduction, and could not maintain any action for his freight without doing so."

Lush, Q. C., and *Sir George Honynman*, now showed cause.—There is no plea upon the record to raise the question of the defendant's right to set off the value of the missing goods against the freight due upon those actually delivered; and it is not a case in which evidence of a usage to that effect could properly be received. A usage to deduct the value in the case of short delivery of goods which have actually been shipped, may be reasonable, inasmuch as there the captain would be liable to a cross-action. But a custom to deduct where by mistake the goods have never been put on board at all, would be in the highest degree unreasonable and unjust. This would [*651 be *setting up a usage against the common law. At common law there is clearly no right of deduction. It is not suggested that the alleged custom here is confined to any particular trade or place, but it is said to obtain all over the world, and in all trades. "Customs must in their nature be confined to individuals of a particular description, and what is common to all mankind can never be claimed as a custom:" per Buller, J., in *Fitch v. Rawling*, 2 H. Bl. 394, 398. It is said that the plaintiff is estopped by the Bills of Lading Act from saying that the goods were not put on board. That statute,—which was passed in consequence of the decision of this court in *Grant v. Norway*, 10 C. B. 665 (E. C. L. R. vol. 70), (a)—recites the mischief it was intended to remedy,—“whereas, it frequently happens that the goods in respect of which bills of lading purport to be signed have not been laden on board, and it is proper that such bills of lading in the hands of a bonâ fide holder for value should not be questioned by the master or other person signing the same, on the ground of the goods not having been laden as aforesaid;” and the 3d section makes the bill of lading conclusive evidence of the shipment, not as against the owner, but as against the master or other person signing it. Before that statute, it is clear that the bill of lading was no estoppel: *Berkley v. Watling*, 7 Ad. & E. 29 (E. C. L. R. vol. 34),

(a) It was there held that the master of a ship signing a bill of lading for goods which have never been shipped, is not to be considered as the agent of the owner in that behalf, so as to make the latter responsible to one who has made advances upon the faith of the bill of lading so signed.

2 N. & P. 178; *Bates v. Todd*, 1 M. & Rob. 106. This is an action for freight. Freight is due to the owner of the ship; and he is entitled to receive it without deduction, even though by the fault of the master and crew, and their negligent and unskilful navigation of the vessel, *the cargo is damaged so as upon arrival at the port *652] of discharge to be then there of less value than the freight: *Dakin v. Oxley*, 15 C. B. N. S. 646 (E. C. L. R. vol. 109). There is no principle of the law of England which warrants the consignee of goods in refusing to pay freight for goods which he has received, because there are other goods undelivered which have not been shown ever to have been shipped. This is an attempt to set up a custom in contravention of the law as laid down in *Ritchie v. Atkinson*, 10 East 295. A carrier is bound by the common law to carry all goods that are tendered to him, but he may insist upon pre-payment by the consignor,—would it be competent to a customer to offer evidence to prove a custom for the *consignee* to pay for the carriage? In the case of the *Don Francisco*, 31 Law J., Adm. 14, 16, Dr. Lushington says: "In our Admiralty law, there is not to my knowledge any head of set-off." In the notes to *Wigglesworth v. Dallison*, 1 Smith's Leading Cases, 5th edit. 530, it is said: "With respect to contracts commercial, it has been long established that evidence of a *usage of trade* applicable to the contract, and which the parties making it knew, or may be reasonably presumed to have known, is admissible for the purpose of importing terms into the contract respecting which the written instrument is silent. The words '*usage of trade*' are to be understood as referring to a particular usage to be established by evidence, and perfectly distinct from that general custom of merchants which is the universal established law of the land, which is to be collected from decisions, legal principles, and analogies, not from evidence in pais, and the knowledge of which resides in the breasts of the judges." Evidence of a custom or usage in contradiction of the law-merchant was held to be inadmissible in *Suse v. Pompe*, 8 C. B. N. S. 538 (E. C. L. R. vol. 98). Does it make any difference that *653] *the master, who is the plaintiff in the action, is a part-owner? He is suing for his co-owners. Then, the defendant is not a "consignee or endorsee for valuable consideration," within the meaning of the act of parliament. He buys the goods of Schultz & Co. through his broker in London, to be shipped by them on board a vessel chartered by them, and specifically appropriated to the defendant. The bill of lading making the goods deliverable to order or assigns, was endorsed and sent to the defendant, and he accepted a draft for the amount, and paid it. The defendant has therefore paid Schultz & Co. for goods which they never shipped. That the property in the timber passed to the defendant the moment it was put on board the *Rhea*, is clear: *Browne v. Hare*, 3 Hurlst. & N. 484, 4 Hurlst. & N. 822; *Cowas-jee, app., Thompson, resp.*, 5 Moore's P. C. 165. [WILLES, J.—*Cowas-jee, app., Thompson, resp.*, was a very peculiar case.] There, the buyer sent the ship: here, the sellers took up the ship for the buyer as his agent. The right of set-off depends upon the *lex fori*, being matter of procedure: *MacFarlane v. Norris*, 2 Best & Smith 783 (E. C. L. R. vol. 110). [BYLES, J.—*Lex loci solutionis* makes the English law applicable here.]

Manisty, Q. C., and *J. Brown*, in support of the rule.—It must be conceded that the result of the evidence was that there is no difference in respect of the right of set-off between the Prussian law and our own. The present case discloses precisely the state of things which the Bills of Lading Act was designed to meet: it was passed for the purpose of obviating the injustice which was felt in the two cases of *Berkley v. Watling* and *Grant v. Norway*. The short question is, what is the true construction of the statute. This is similar to the case of an action against a carrier, stating the custom, but omitting to notice the limit as to the value of *the goods: *Clarke v. Gray*, 6 East 564; *M'Cance v. The London and North Western Railway Company*, 7 Hurlst. & N. 477. This is not a case of set-off at all: the short-delivery, it is submitted, extinguishes a part of the shipowner's claim. This is much like the case of *Bamford v. Harris*, 1 Stark. N. P. C. 343 (E. C. L. R. vol. 2), where it was held, that, where by the custom of the hat-trade the amount of the injury sustained by the hats in the process of dyeing is always to be deducted from the charge for dyeing, the defendant is entitled to such deductions in an action brought by the dyer, without giving any notice of set-off, and although there has not been any previous adjustment of the amount of damage. The usage here relied on contravenes no universal rule of law. In *Field v. Lelean*, 6 Hurlst. & N. 617, upon the sale by one broker to another of shares in a mine, they respectively signed bought and sold-notes, the former of which was as follows,—“Bought T. F. 250/5120ths shares in Wheal Charlotte, at 2*l.* 5*s.* per share, 562*l.* 10*s.*, for payment half in two months, and half in four months.” In an action for not accepting the shares, it was held that evidence was admissible of a custom among brokers in mining shares, that, in contracts relating to the sale and purchase of such shares, the delivery takes place *at the time appointed for payment*. This usage is to be read as part of the contract,—as if the contract had been in writing, and the usage incorporated into it in so many words: consequently, the claim is deductible under never indebted. [WILLES, J.—Like the case of an attorney's lien?] Yes. In *Cleworth v. Pickford*, 7 M. & W. 314, to indebitatus assumpsit for work and labour, and for services in navigating certain barges for the defendants, the latter pleaded that the claim was for wages due for services performed by the plaintiff as master of a boat used by the defendants for the carriage of *goods, they being common carriers, and that the plaintiff was hired by them under an agreement, that, as master [*655 of the said boat, he was to be responsible for the safety and due delivery of all goods taken on board by him, and was to be chargeable for all pilferages of or damage or losses to any goods under his charge; and that the amount thereof should be deducted from his wages, and might be pleaded or set off accordingly. The plea then averred the delivery of a pipe of wine to the plaintiff on board the boat; and that, whilst it was so in the plaintiff's charge, the wine was pilfered and water substituted in lieu thereof, whereby the pipe of wine was greatly damaged, for which damage the defendants were liable, and which damage amounted to a certain sum, &c., which far exceeded the amount of the causes of action in the declaration mentioned. The plea then claimed to set off the loss the defendants had

thereby sustained against the plaintiff's demand. To this plea, the plaintiff replied *de injuriâ*: and it was held that the replication was improper, and that the plea amounted to the general issue. So here, the usage amounts to an agreement that the freight is to be paid short the value of the goods not delivered. In *Brown v. Byrne*, 3 Ellis & B. 703 (E. C. L. R. vol. 113), a bill of lading expressed that goods shipped at N. were deliverable at L., to order or assigns, "he or they paying freight for the said goods five-eighths of a penny sterling per pound, with 5 per cent. *primage*, and *average* accustomed." By the usual custom in the trade at L., three months' interest or discount is deducted from freights payable under bills of lading on goods coming from certain ports, including N. The assignee of the bill of lading having received the goods, the shipowner claimed the freight without any deduction, contending that the custom was not binding in law, as *656] contradicting the written *contract. The assignee paid the freight less the discount. Upon a case stating the above facts, the Court of Queen's Bench held that the custom was binding, and controlled the bill of lading.^(a) This is just the case to which the *maxim* *modus et conventio vincunt legem* ought to apply. The usage set up is a very beneficial one; for, if the freighter were left to his remedy against the master or owners by cross-action for short delivery, that remedy might in many cases where the vessel is a foreigner be absolutely futile. In *Smith's Leading Cases* 531, it is said that, "with regard to particular *commercial usages*, evidence of them is admissible either to engraft terms into the contract, as in those cases concerning the time for which the underwriters' liability in respect of the goods shall continue after the arrival of the ship,—*Noble v. Kennaway*, Dougl. 510; and see the observations on this case in *Ougier v. Jennings*, 1 Campb. 503, n.; *Moon v. The Guardians of the Witney Union*, 3 N. C. 814, 5 Scott 1,—or to explain its terms, as was done in *Udhe v. Walters*, 3 Campb. 16, by showing that the Gulf of Finland, though not so treated by geographers, is considered by mercantile men part of the Baltic, and in *Hutchinson v. Bowker*, 5 M. & W. 535, where it was proved that *good* barley and *fine* barley signified in mercantile usage different things." Many other instances are given which bear out this view.

*657] *ERLE, C. J.—I am of opinion that this rule must be discharged. This was an action for freight due by contract. The charter-party and bill of lading were put in: and upon the plaintiff's case it was clear that the money claimed was due under the contract. The defence was that part of the goods mentioned in the bill of lading were missing; and the defendant claimed to be entitled to deduct from the amount due for freight of the goods delivered the value of the missing articles. The question we have to decide, is, whether the defendant has such a right to deduct. I think he has no such right. Upon general principles of law, I think the right claimed

(a) *Sir G. Honyman* here referred to *Cuthbert v. Cumming*, 10 Exch. 804, 815, where Alderson, B., in delivering the judgment of the court, speaking of *Brown v. Byrne*, says,—“If the word ‘controlled’ be taken in its literal sense, we do not agree with the conclusion. If the word means, ‘to alter the effect of that which was clearly expressed’ on the bill of lading, we think that evidence of the custom was not admissible for that purpose: but, if the word ‘controlled’ was used (as it probably was) in the sense of *explain*, it is perfectly right.”

has no existence. It is admitted that the 600 staves were never put on board. No fraud is suggested on either side: it was by a mere mistake that they were left behind. Under the circumstances, there is no ground for saying that there is any usage to entitle the consignee to make the deduction claimed. But the defendant prayed in aid the Bills of Lading Act, 18 & 19 Vict. c. 111, the 3d section of which enacts that "every bill of lading in the hands of a consignee or endorsee for valuable consideration, representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment as against the master or other person signing the same." The defendant contends that this enactment applies. The plaintiff has urged several grounds why it should not. Upon many of these I think he has failed. I think Meyer, the master and part-owner, is a person upon whom the statute operates, being the person who signed the bills of lading. It is said that he is suing for his co-owners, and therefore it is to be taken as if all the part-owners were parties to the action. I think that argument is entirely untenable. This is an action upon the contract contained in the bill *of lading: and the law allows [*658 the master to sue upon that contract. The master is the owner of the contract, as if he were the sole person interested. Indeed, I take the statute to have meant to make the master responsible, with a view to remedy the grievance alluded to in the course of the argument in cases of foreign ships, which would often be beyond the reach of redress if the merchant were put to his action. I therefore think Mr. Meyer in this action must be taken to be a person against whom the statute operates. Then it is said that the statute was passed for the benefit of the "consignee or endorsee for valuable consideration" of the bill of lading, and that Dresser did not stand in that position, he having purchased the cargo of timber of Messrs. Schultz & Co. of Memel, and directed them to charter a vessel to bring it to London, and the plaintiff's vessel having been chartered by them accordingly: and therefore it was contended that Dresser was not simply consignee for value, but stood in the character of consignor; and that, as his agents Schultz & Co. left part of the goods at Memel, the omission could be rectified by an action against them, and therefore, having a direct remedy against some one else, he could not have recourse against the master in the manner claimed here. If it were necessary to decide that point, I should be against the contention of the plaintiff. Dresser is the consignee of the goods. The bill of lading is endorsed and sent to him; and, upon the faith of the representation contained in that document, he accepted the draft of Schultz & Co. He, therefore, clearly was consignee or endorsee for valuable consideration; and so far it seems to me that that objection is not tenable. But I do not consider it necessary to decide the case upon that point. I will assume for the purposes of this judgment that the defendant has a right, as *consignee or endorsee for valuable [*659 consideration, to insist that the representation in the bill of lading that the goods had been shipped was conclusive as against the plaintiff, and that he has a right by virtue of the bill of lading and the statute to say that the goods were put on board although in point of fact they were not; yet still I think the defendant fails to make out his right to deduct the value of the missing goods from the amount of

freight payable for those which were actually delivered. I consider it to be established law that the freighter cannot set off against the amount of freight due to the shipowner the value of goods damaged even by the carelessness and negligence of the master and crew. The recent case of *Dakin v. Oxley*, 15 C. B. N. S. 646 (E. C. L. R. vol. 109), is replete with references to learned authorities to that effect. The point decided there was, that, where the cargo had through the misconduct of the master and crew become so much damaged in the course of the voyage as to be worth less than the amount of the freight on its arrival at its destination, the shipper could not abandon it to the owner for the freight: but the authorities collected by the learned judge who prepared that judgment show that our law, in common with the laws of most other mercantile countries, negatives the right of the owner of the cargo to set off damage to the goods against freight. Neither do I think such a set-off can be allowed against the freight due for other goods of the value of goods that are missing and have never been put on board. The right, if any, is by cross-action. This is the established law of England. But the defendant here has given evidence of a usage prevailing in the mercantile world to allow a deduction for missing goods whether shown to have been put on board or not. The evidence given by the defendant himself is that *660] which gives universality to that usage. He says it obtains all over the world in the timber-trade; and that he himself has had it allowed in every trade in every place. He further says (being himself a shipowner), "A vessel of mine made short delivery of bacon from New York, and the deduction was made." If the general law be as I have suggested, this usage cannot avail the plaintiff. It is a self-evident contradiction to my mind, to say that the general law does not allow the deduction, and that there is a universally established usage to allow it. A universal usage which is not according to law cannot be set up to control the law. I also think the evidence was not of a usage to create a right according to custom: it seems rather to have been adopted in some cases as a more convenient course of business. The custom among underwriters and insurance-brokers to set off premiums against losses, would be a custom of the same sort. (a) There is no sign of this alleged custom to deduct having ever been enforced in invitum: but in all cases it seems to have been done by agreement between the parties. Such a general right as that claimed here would, I think, be very inconvenient; it would be giving opportunity for making unlimited claims for deduction, and lead to great confusion. No such difficulty arises in the case of particular usages confined to local districts. Many contracts are construed by the course of business in the particular trade or in the particular place where they are made. But that is not at all analogous to a universal usage prevailing the whole world. In the cases where such local usages are imported into the contract, it is because they tacitly form part of it, like those contracts in which we find the words "and other usual terms." They then form part of the contract *661] itself. The contract expresses what is peculiar to the bargain between the parties, and the usage supplies the rest. For

(a) See *Sweeting v. Pearce*, 7 C. B. N. S. 449 (E. C. L. R. vol. 97).

these reasons, I think the usage cannot prevail, and that the statute is no bar to the plaintiff's right to recover.

WILLES, J.—I am of the same opinion. But for the alleged usage and the Prussian law, unquestionably the plaintiff would be entitled to recover the full freight for the goods actually carried, and the defendant would have no right to deduct or set off the value of the goods which were not put on board. Then, does the alleged custom or the Prussian law absolve the defendant from the liability which *primâ facie* he is under? First, as to the alleged custom,—it is clear, that, if there had been any particular usage affecting this case, it ought to be read into the contract; and, if the effect of the usage is, to extinguish the debt, or a portion of it, the defendant is entitled to avail himself of it, because such is the agreement between the parties. Then, assuming it to be valid, the usage proved here was to the effect that the freighter may deduct from the amount of freight due in respect of the goods actually carried and delivered, the value of goods which have been put on board but not delivered, having been lost in the course of the voyage through the default of the master. Now, that will not avail the defendant, without calling in aid the 3d section of the Bills of Lading Act, 18 & 19 Vict. c. 111, and insisting that the effect of that section is to make him, as a consignee for value, a person who may, as against the master, insist that the goods were actually put on board, and then adding that to the contract which deals only with goods actually on board. I take leave to say, both with respect to the application of the usage and of the Prussian law, that, if they were made out to be in favour of the defendant, I very *much doubt whether the framers of the 3d [*662 section of the statute ever intended that the consignee was to get more than his remedy against the master by the ordinary law for having signed a bill of lading for goods which he has not actually received. It is not necessary, however, to give any opinion upon that; for, it appears to me that there was not any usage made out affecting this case. I apprehend that a usage, to be available, must be some practice of merchants creating rights between the parties to a contract in respect of some matter which is not in terms provided for by the contract. It must be something more than a mere mode of carrying on business adopted with reference to the settlement of debts by payment or otherwise,—something more than a usual mode of settling accounts, by allowing a claim, for instance, in respect of the principal from one of the parties against whom the charge is made in his account. If everybody in the kingdom was in the habit of allowing claims against a principal whose debts he was not bound to guarantee, in accounts with persons who were creditors of the principal, as well as debtors of himself, trusting to his principal to pay him (which would not be out of the way, or not an uncommon thing to do), nobody would be bound in the next account which might come in to make the same allowance,—for this simple reason, because it is not a matter of agreement between the parties generally, but an agreement between the parties in the particular instance. It is not a usage governing all transactions in business generally; it is a usual form of agreement for the purpose of settling the claims which arise from time to time, and which must be settled somehow, and which

have sued. No doubt they might: but, if they had chosen to sue in that way, and one of them had signed, I apprehend, as he would have been disqualified himself, so would all his companions as plaintiffs in the suit have been disqualified likewise. As Lord Ellenborough said, in the case which has been alluded to, where two people endeavour to obtain satisfaction against one, you cannot recover under such circumstances. If you want his strength to enable you to succeed, you must fail by his weakness when you join him. This is a stronger case than that—a case in which the owners have chosen to *667] sue, to save all *difficulties, in the name of the party who signs. If they take the benefit of his services as plaintiff in the action, they must take the benefit with the burden that he has under the enactment of the statute; and that which affects the person actually signing, affects them. Therefore this is a case in which the words of the statute apply so far as the signature of the party is concerned. Still I think, notwithstanding the evidence which has been given of the custom, that the plaintiff is entitled to the full freight without any deduction. My Lord and my brother Willes have called attention to the authorities in which, from *Mondel v. Steel*, 8 M. & W. 858, down to the last term in this court,^(a) and also in the Admiralty Court, it has been in effect determined that neither damage to the goods nor loss can be set off against the freight. Then, can custom change the law? I need say no more than this, that, if this is to be considered as a general law for all mankind in all places, it is an attempt to prove the law by a usage, which cannot be done. If it is to be treated as a local custom, it clearly is not a local custom. If it is a custom of a particular trade, it seems to be only a mode of settling accounts. Further, suppose it were anything else, has there been time for it to grow up, if I may so express myself, and to act as an estoppel? I think not. I think full effect may be given to the words of this statute, without saying that those words apply to a custom of this nature, even if it were applicable. From these difficulties the learned counsel endeavour to escape, by saying that it is a usage with reference to which the parties must be deemed to have contracted, and must therefore be considered as part of the contract. But the fact is, the parties contracted in Prussia; and, though there *668] is some loose evidence of a usage as to *other parts of the world, if it be evidence at all, it must be evidence of what took place there. One cannot suppose that the parties contracted in Prussia with reference to a Prussian custom which might or might not apply in the circumstances which have arisen. For these reasons, I entertain no doubt that the verdict was quite right.

KEATING, J.—I am of the same opinion. I think this alleged usage, if it be taken to have been a practice or mode of settling accounts in cases of undisputed claims, would be a highly reasonable and most convenient mode. But, if it be strained beyond that, and set up as being a universal practice which is to control all contracts, even in the case of disputed claims, it appears to me that it would be most objectionable, and would in truth be directly contrary to that which has been laid down as the law with reference to the payment

(a) *Dakin v. Oxley*, 15 C. B. N. S. 646 (E. C. L. R. vol. 109).

of freight, and the preventing parties making deductions from the freight in the shape of unliquidated damages. For the reasons which have been given, I think this usage cannot prevail in the present case: and, with reference to the statute, I would merely say that I entirely agree with the doubts which have been suggested rather than expressed by my learned brother Willes. I very much doubt whether it ever was in the contemplation of the legislature in passing this act, to enable parties to use the statutable authority created thereby for the purpose of carrying out or establishing such a usage as has been attempted to be set up on the present occasion. For these reasons, I think the plaintiff is entitled to retain the verdict.

Rule discharged.

*LOVEGROVE *v.* THE LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY. *June 6.* [*669]

GALLAGHER *v.* PIPER and Another.

1. The plaintiff, a labourer in the service of a railway company, was employed to fill trucks with ballast at a pit, and to move them when filled along temporarily laid rails on to the permanent rails, and there attach them to an engine. Whilst so employed, one of the temporary rails, in consequence of its having been insecurely placed, through the negligence of another servant of the company, whose duty it was to superintend the laying of them, springing up from the pressure of the loaded truck, struck the plaintiff, and severely injured him:—

Held, that, the injury having been occasioned by the negligence of a fellow-workman of the plaintiff, whilst both were engaged in a common occupation, the company were not responsible, in the absence of evidence that they had knowingly intrusted the duty of laying the rails to an incompetent person.

2. The plaintiff was employed by the defendants in constructing a scaffolding for a large building which they were engaged in erecting. Being short of materials, the plaintiff applied to one M., the foreman of the scaffolders, for the necessary supply of boards. M. applied to P., who was the defendants' general foreman or manager, who refused to furnish them, saying that the plaintiff must get on as he best could. The plaintiff proceeded with his work, and, having no flooring to stand on, placed his foot upon a putlog, from the rounded surface of which he slipped, and, falling to the ground, was crippled. In an action against the defendants, charging them with negligence in not supplying sufficient materials, whereby the danger of the work was unnecessarily aggravated, the jury found that the scaffolding was insufficient and unsafe, to the knowledge of both the general manager P., and the foreman of the scaffolders, M., but *not to the knowledge of the defendants* (who personally never interfered with the works); and they further found that the plaintiff himself was guilty of no negligence:—

Held, dissentiente Byles, J., and dubitante Williams, J.,—that the defendants were not responsible,—the plaintiff and P. being fellow-workmen engaged in a common service, and there being no evidence of *personal* negligence on the defendants' part, in failing to supply sufficient and safe materials, or in selecting an incompetent foreman.

LOVEGROVE *v.* THE LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY was an action brought by a labourer in the employ of the London, Brighton, and South Coast Railway Company, to recover damages for a serious injury sustained by him under the following circumstances:—The plaintiff and other labourers were employed in filling and conveying trucks of ballast from the pit along a line of rails temporarily laid for that purpose on a part of the company's railway to a spot where they were to be coupled to an engine. These temporary rails were laid down by certain men called "plate-layers," under the superintendence of one Steer: but, in consequence of there being an insufficient number of sleepers placed for the due sup-

port of the rails, one of them started whilst the plaintiff was assisting *670] in propelling a loaded truck along it, *and the plaintiff met with the injury complained of. The insufficiency of sleepers was the negligence relied on.

On the part of the defendants it was objected that the injury to the plaintiff having been caused by the negligence of a fellow-workman, the employers were not responsible.

On the other hand it was insisted that the plaintiff and Steer, though in one sense fellow-servants, were not engaged in a common occupation, inasmuch as the plaintiff had nothing to do with the laying of the rails, so as to make that principle apply; that the company were responsible for the reasonable sufficiency of the materials used in their work, and also for the competency of the persons employed by them; and that, at all events, there was evidence to go to the jury as to whether or not Steer was a competent person to employ in such work.

The Lord Chief Baron, before whom the cause was tried at the last Assizes at Kingston, declined to leave any question to the jury, and directed a nonsuit to be entered.

Parry, Serjt., in Easter Term last, obtained a rule nisi for a new trial, on the ground that there was evidence to go to the jury that the defendants were liable. He referred to the dicta of Lord Cranworth, C., in *Paterson v. Wallace*, 1 Macq. 748, and *The Bartonshill Coal Company v. M'Guire*, 3 Macq. 300. [BYLES, J., referred to *Waller v. The South Eastern Railway Company*, 2 Hurlst. & Colt. 102.]

GALLAGHER v. PIPER was an action brought against the defendants, who are extensive builders and contractors in London, by a labourer who had with others been employed to put up a scaffolding for a new *671] building *which they were erecting in Leadenhall Street, for an injury alleged to have been sustained by him whilst doing that work, in consequence of the insufficiency of the materials furnished by the defendants for that purpose.

The cause was tried before Byles, J., at the sittings in London after last term, when the facts which appeared in evidence were as follows:—

One Phear was the general foreman or manager of the work, whose duty it was to supply the necessary materials. The foreman of the scaffolders was one Mahoney. It was proved that the usual mode of making a scaffolding like that in question was, to erect poles at a short distance from the intended wall, to which were attached other poles fastened to them longitudinally at intervals, and short pieces called "putlogs" resting on the horizontal pole at one end and in the wall as it progressed at the other end. Upon these putlogs were laid boards to form a floor for the workman,—the floor usually consisting of four or five planks, with one or two planks placed edgewise from pole to pole to form a screen. The plaintiff being thus employed, in consequence, as he alleged, of the insufficient quantity of boards supplied to him, was compelled in the progress of his work to put his foot upon the round surface of a putlog in order to raise a board from the lower stage, when his foot slipped, and he fell from a considerable height and was much injured. There was evidence to show that

Mahoney was aware of the insufficiency of the materials (in point of quantity) for the proper performance of the work, and also that the fact of such insufficiency had been made known to Phear on more than one occasion, and that he said the plaintiff must get on as he best could. It was admitted that the defendants themselves had no personal knowledge of the matter.

*Under these circumstances, it was submitted for the plaintiff that the defendants were responsible for the negligence of [*672 their manager and foreman which caused the accident.

On the other hand, it was submitted for the defendants that the case fell within the rule which excuses the master from liability to a servant or workman for an injury resulting to him from the negligence of a fellow-servant or workman, where the master himself has been guilty of no negligence or want of care either in the providing proper machinery or servants of competent skill.

The following are the questions which the learned judge left to the jury, with their answers thereto:—

1. Was it the defendants' duty to provide a safe and sufficient scaffold? *Answer.* Yes.

2. Was the scaffolding insufficient and unsafe? *Answer.* It was

3. Was it insufficient and unsafe to the knowledge of the defendants,—or to the knowledge of Phear,—or to the knowledge of Mahoney? *Answer.* Not to the personal knowledge of the defendants; but it was to the knowledge of Phear and Mahoney.

4. Was the plaintiff guilty of negligence either in the act itself or in his mode of doing it? *Answer.* Not in the act itself; nor (in the opinion of the majority of the jury) in his mode of doing it.

And the jury assessed the damages at 100*l.*

A verdict was thereupon entered for the plaintiff for 100*l.*, leave being reserved to the defendants to move to enter a verdict for them if the court should be of opinion that the circumstances absolved them from personal liability.

Giffard, in Easter Term, accordingly obtained a rule nisi to enter a verdict for the defendants or a nonsuit, *on the ground that, [*673 upon the facts as proved, there was no evidence to go to the jury to charge the defendants; or for a new trial on the ground that the verdict was against the weight of evidence.

Bovill, Q. C., and *A. L. Smith*, on a former day in this term, showed cause against Parry's rule.—The nonsuit in this case was right. The case is not distinguishable from *Waller v. The South Eastern Railway Company*, 2 Hurlst. & Colt. 102, where it was held that a railway company is not liable for injury to the guard of a train, occasioned by the negligence of the "ganger" of the plate-layers in not keeping the permanent way in proper repair and condition,—the two servants being engaged in one common object, viz. the safe conduct of the passengers on their journey. That case proceeded mainly upon a judgment of Chief Justice Shaw in an American case of *Farwell v. The Boston and Worcester Railroad Corporation*, 4 Metcalf 49,—cited in a note at the end of the *Bartonshill Coal Company v. M'Guire*, 3 Macq. 316. There, a railway company employed A., who was careful and trusty in his general character, to tend the switches on their road; and, after he had been long in their service, they employed B.

to run the passenger train of cars on the road, B. knowing the employment and character of A.: and it was held that the company were not answerable to B. for an injury received by him, while running the cars, in consequence of the carelessness of A. in the management of the switches. Several previous cases, beginning with *Priestly v. Fowler*, 3 M. & W. 1, had settled the principle on which the liability of the master under such circumstances rests. "The mere relation of master and servant," says Lord Abinger, "never can imply an obligation on the part of the master to take more care of *674] the servant than he may *reasonably be expected to do of himself. He is, no doubt, bound to provide for the safety of his servant in the course of his employment, to the best of his judgment, information, and belief. The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself: and in most of the cases in which danger may be incurred, if not in all, he is just as likely to be acquainted with the probability and extent of it as the master." Again, in *Hutchinson v. The York, Newcastle, and Berwick Railway Company*, 5 Exch. 343, where a servant of a railway company, in discharge of his duty as such, was proceeding in a train under the guidance of others of their servants, through whose negligence a collision took place, and he was killed,—it was held that his representative could not maintain an action against the company under the 9 & 10 Vict. c. 93; and that it made no difference whether the accident was occasioned by the negligence of the servants guiding the train in which the deceased was, or of those guiding the other train, or of both. "The principle," said Alderson, B., "is, that a servant, when he engages to serve a master, undertakes, as between him and his master, to run all the ordinary risks of the service; and this includes the risk of negligence on the part of a fellow-servant, whenever he is acting in discharge of his duty as servant of him who is the common master of both." And at the close of the judgment, the learned Baron says: "Though we have said that a master is not in general responsible to one servant for an injury occasioned to him by the negligence of a fellow-servant while they are acting in one common service, yet this must be taken with the qualification that the master shall have taken due care not to expose his servant to un- *675] reasonable risks. The servant, when he *engages to run the risks of his service, including those arising from the negligence of fellow-servants, has a right to understand that the master has taken reasonable care to protect him from such risks, by associating him only with persons of ordinary skill and care." There was no suggestion here that Steer, whose negligence caused the accident, was not a competent workman. So, in *Wigmore v. Jay*, 5 Exch. 354, the defendant, a master builder, having contracted to erect a certain building, employed W. as a bricklayer; the scaffolding was erected under the superintendence of the defendant's foreman, the defendant not being present, and was constructed by men in the employ of the defendant, who used an unsound ledger pole, in consequence of which the scaffold gave way whilst W. was at work upon it, and he was thrown to the ground and killed. The unsoundness of the pole had been previously pointed out to the foreman. It was held that no

action could be maintained against the defendant under the 9 & 10 Vict. c. 93, there being no evidence that the foreman was an improper person to employ for that purpose. These cases, as well as the more recent one of *Searle v. Lindsay*, 11 C. B. N. S. 429 (E. C. L. R. vol. 103), fully establish the non-liability of the defendants in this case.

Parry, Serjt., and Joyce, in support of the rule.—There was evidence of negligence on the part of the company which at all events should have been submitted to the jury. The argument on the other side amounts to this, that, where two servants are engaged in one common object, and one negligently kills or maims the other, there is no remedy against the common employer. The fact of two men being in the same service, will not exonerate the employer; for, no doubt, the gardener might recover if run over by the *negligence of the coachman. But, whether or not these persons were en- [*676
gaged in a common object, was a question of fact for the jury. After the case of *Waller v. The South Eastern Railway Company*, it must be conceded that it would be difficult to contend that Steer and the plaintiff were not engaged in a common object. But the opinion of the jury should have been taken upon it. Further, in employing servants to do a dangerous work, the company were bound to see that their tackle and machinery are in good order, and their agents reasonably competent. The burthen of proof lay on them. [WILLES, J.—It was for the plaintiff to prove negligence.] The accident is *prima facie* proof of negligence.(a) A master is bound to take all reasonable precautions to secure the safety of his workmen; more especially if the work be of a dangerous character and the persons engaged proverbially reckless: *Paterson v. Wallace*, 1 Macq. 748. The same principle is established in *Brydon v. Stewart*, 2 Macq. 30, and *The Bartonshill Coal Company v. M'Guire*, 3 Macq. 300, and *Clarke v. Holmes*, 7 Hurlst. & N. 937. Here, the plaintiff has established a *prima facie* case of negligence against somebody whom the company has employed. Suppose the person so employed were a common navigator,—could it be said that he was a competent person to be intrusted with an employment so responsible? [WILLES, J.—You say the burthen lay on the company to prove that they had employed competent persons?] Proof having been given that the rails were unskilfully and improperly laid, it was for the company to show that they had been guilty of no negligence in the selection of the persons to perform that duty. In *Hutchinson v. The York, Newcastle, and Berwick Railway Company*, 5 Exch. 343, 353, Alderson, B., thus qualifies the rule: “Though we have said that a master is not in general responsible to one *servant for an injury occasioned to [*677
him by the negligence of a fellow-servant while they are acting in one common service,(b) yet this must be taken with the qualifica-

(a) See *Byrne v. Boadle*, 2 Hurlst. & Colt. 722.

(b) *Quære*, what is the limit of this community of employment? Does it extend to every person employed by the company? *Waller v. The South Eastern Railway Company*, 2 Hurlst. & Colt. 102, decides that a guard of a train cannot maintain an action against the company for an injury resulting to him from the negligence of the ganger of the plate-layers. The same principle would apply where the injury was occasioned by the negligence of a signal-man or a pointsman. All these, it is said, are fellow-servants or fellow-workmen, because all are engaged in one common object, viz. in the conveyance of the train to its destination. But, where does it end? If the station-master were injured through the negligence of one of these,

tion that the master shall have taken due care not to expose his servant to unreasonable risks. The servant, when he engages to run the risks of his service, including those arising from the negligence of fellow-servants, has a right to understand that the master has taken reasonable care to protect him from such risks by associating him only with persons of ordinary skill and care." In *Priestley v. Fowler*, 3 M. & W. 1, the plaintiff improperly drove the van, knowing that it was over-loaded.

The Court desired to hear the second case argued before proceeding to give judgment.

O'Brien, Serjt., and *Folkard*, now showed cause.—Undoubtedly a master is not responsible to his servant for an accident resulting to the latter from the negligence of a fellow-servant whilst pursuing a *678] common object, or for any latent defect in the machinery *furnished by him, provided he (the master) exercises reasonable care and caution in the selection of his servants or in providing sufficient machinery or materials. His exemption ends there. In this all the cases, from *Priestley v. Fowler*, 3 M. & W. 1, down to *Searle v. Lindsay*, 11 C. B. N. S. 429 (E. C. L. R. vol. 103), are of accord. In *Wigmore v. Jay*, 5 Exch. 354, there was no negligence on the part of the persons who constructed the scaffolding, or on that of the master who employed them and who supplied the materials: the accident arose from a defect which was unknown to the master. [WILLES, J.—So here, the defendants had no personal knowledge of the insufficiency of materials.] Phear, the person to whom they delegated the duty, had. Mahoney made repeated complaints to him of the insufficient supply of materials and the consequent danger to the men; and, from his disregard of these complaints, the plaintiff was exposed to an unnecessary degree of risk. It was urged on moving for the rule, that the plaintiff was himself contributory to the accident, by proceeding with the work knowing of the insufficiency of the supply of materials. *Clarke v. Holmes*, 7 Hurlst. & N. 937, however, shows that that is not a legitimate argument. There, the plaintiff was employed by the defendant to oil dangerous machinery. At the time the plaintiff entered upon the service, the machinery was fenced, but the fencing became broken by accident. The plaintiff complained of the dangerous state of the machinery, and the defendant promised him that the fencing should be restored. The plaintiff, without any negligence on his part, was severely injured in consequence of the machinery remaining unfenced: and it was held by the Exchequer Chamber,—affirming the judgment of the court below,—that the defendant was liable for the injury. There, as here, the plaintiff had *679] full knowledge *of the risk. Some of the judges in the Exchequer Chamber place the decision upon a very high ground. Cockburn, C. J., says: "I consider the doctrine laid down by the House of Lords in the case of *The Bartonshill Coal Company v. Reid*, 3 Macq. 266, as the law of Scotland with reference to the duty of a master, as applicable to the law of England also, viz. that, where a servant is employed on machinery from the use of which danger may arise, it is the duty of the master to take due care, and he probably would fall within the rule. But would a clerk, or the secretary of the company, whether travelling on the business of the company or for his own pleasure, be within it?"

to use all reasonable means, to guard against and prevent any defects from which increased and unnecessary danger may occur. No doubt, when a servant enters on an employment from its nature necessarily hazardous, he accepts the service subject to the risks incidental to it; or, if he thinks proper to accept an employment on machinery defective from its construction, or from the want of proper repair, and with knowledge of the facts enters on the service, the master cannot be held liable for injury to the servant within the scope of the danger which both the contracting parties contemplated as incidental to the employment." "It was, indeed, strongly urged upon us, on the part of the defendant, that, as the plaintiff, upon becoming aware that the machinery was no longer properly fenced, instead of refusing to go on, as he might have done, continued to perform his service, with a knowledge of the increased risk to which he was exposed, he must be taken to have voluntarily incurred the danger, and is therefore in the same position as if he had originally accepted the service as one to be performed on unfenced machinery. I am, however, of opinion that there is a sound distinction between the case of a servant who knowingly enters into a contract to work on defective machinery, and that of one who, on a temporary defect arising, is induced *by the master, after the defect has been brought to the knowledge of [*680 the latter, to continue to perform his service, under a promise that the defect shall be remedied. In the latter case it seems to me that the servant by no means waives his right to hold the master responsible for any injury which may arise to him from the omission of the master to fulfil his obligation:" Crompton, J., and Byles, J., express similar opinions,—the latter observing that the master is usually better informed, and is a volunteer, whereas the workman ordinarily has no choice. He further says: "It may be true that some of the cases cited at the bar are not quite consistent with this rule, particularly those which seem to make the *personal* misconduct or *personal* knowledge of the master a necessary ingredient in his responsibility. But we are a court of error, at liberty to decide on principle, and fortified by higher authority. Why may not the master be guilty of negligence by his manager or agent, whose employment may be so distinct from that of the injured servant that they cannot with propriety be deemed fellow-servants? And, if a master's personal knowledge of defects in his machinery be necessary to his liability, the more a master neglects his business and abandons it to others, the less he will be liable." [BYLES, J.—The question here is, whether notice to Phear, the general manager, was notice to the defendants. EBLE, C. J.—In *Searle v. Lindsay*, it was held not to be enough that the chief engineer, whose duty it was to see that the machinery continued in proper working condition, had knowledge of its defective state.] In that case the master had supplied all that was necessary. Here, the defendants never personally interfered; the duty of supplying materials for the erection of the scaffolding was necessarily delegated to their manager. The whole contention on the part of the defendants at *the trial was, that there was no deficiency of [*681 materials, and that the plaintiff himself was negligent. It will be always easy for a master to avoid liability, if personal knowledge is necessary, by keeping out of the way. In *Patterson v. Wallace*, 1

Macq. 751, Lord Cranworth, C., says: "When a master employs a servant in a work of a dangerous character, he is bound to take all reasonable precautions for the safety of that workman. This is the law of England no less than the law of Scotland. It is the master's duty to be careful that his servant is not induced to work under a notion that tackle or machinery is staunch and secure, when in fact the master knows, or ought to know, that it is not so. And if from any negligence in this respect damage arise, the master is responsible." [ERLE, C. J.—If you complain of a breach of duty, you are bound to prove it.] The jury found here that the scaffolding was insufficient and unsafe to the knowledge of Phear and of Mahoney, and that the plaintiff was not guilty of any negligence. The foreman or manager being thus fixed with notice, is not that enough to make the defendants responsible? In *Mellors v. Shaw*, 1 Best & Smith 437 (E. C. L. R. vol. 101), the declaration stated that the defendants were owners of a coal-mine, and that the plaintiff was employed by them as a collier in the mine, and in the course of his employment it was necessary for him to descend and ascend through a shaft constructed by the defendants; that, by the negligence of the defendants, the shaft was constructed unsafely, and was, by reason of not being sufficiently lined, in an unsafe condition, which the defendants well knew; and that, by reason of the premises, and also by reason, as the defendants well knew, of no sufficient or proper apparatus having been provided by the defendants to protect the plaintiff from injuries arising from the unsafe state of the shaft, a stone fell from the side of the *682] shaft on the head of the plaintiff, and he was dangerously wounded. The defendants pleaded not guilty; and at the trial it was proved that Shaw, one of the two defendants, was manager of the mine, and that it was worked under his personal superintendence; and that the plaintiff was not aware of the state of the shaft. The jury found that the defendants were guilty of personal negligence: and, upon a motion to enter a nonsuit, the court held, that, upon the above finding of the jury, Shaw was liable, and therefore that the other defendant was liable also. Crompton, J., there says: "I conceive that the rule laid down in *Priestley v. Fowler*, that a servant on entering the service of an employer takes upon himself the risks of the service, does not apply where there has been personal negligence in the master which causes the injury to the servant." Can it be said here that personal negligence on the part of the general foreman or manager was one of the risks which this plaintiff consented to take upon himself when he entered the employ of the defendants? And, can it be said that the foreman is a man of competent skill and prudence, when he permits, and even insists upon a labourer working at a scaffold which he knows to be insufficient and insecure? *Brydon v. Stewart*, 2 Macq. 30, is also an authority to show the extent to which an employer is bound to look to the safety of those employed by him. Builders make contracts for works in different and distant parts of the country. It is impossible that the master can be present everywhere so as to have personal knowledge of all that is done. To hold that the absence of personal knowledge will prevent the master from being responsible in these cases, will be holding out a premium for negligence.

Giffard and Murphy, in support of the rule.—The *plaintiff's [*683 case rests upon a supposed breach of duty on the part of the defendants. No doubt, as between the master and a stranger, the master is in general liable for injuries resulting from the negligence of his servants: but, as between the servant and his master, the latter is not responsible to the former for an injury sustained through the negligence of a fellow-servant or workman, unless the master is shown to have been personally guilty of negligence, either in respect of the insufficiency of tackle or machinery, or in respect of his having employed an incompetent person, knowing his incompetency. There was no such evidence here. Upon the authority, therefore, of *Priestley v. Fowler*, 3 M. & W. 1, *Hutchinson v. The York, Newcastle, and Berwick Railway Company*, 5 Exch. 348, and *Wigmore v. Jay*, 5 Exch. 354, the plaintiff ought to have been nonsuited. The jury found that the scaffolding was insufficient and unsafe, but not to the knowledge of the defendants. What is or is not a sufficient quantity of materials in such a case, is not regulated by any given number of poles, putlogs, and boards: the necessity of course increases as the work progresses. The proper person to regulate the supply must necessarily be the foreman: for any negligence on his part in this respect, the employers would not be responsible unless the knowledge of it were brought home to them. The case of *Clarke v. Holmes*, 7 Hurlst. & N. 937, is put on the ground that there was an express contract on the part of the master for refencing the machinery. *Wigmore v. Jay* was a much stronger case than this. *Riley v. Baxendale*, 6 Hurlst. & N. 445, is an authority to show that no contract or duty on the part of an employer not to expose his servant to extraordinary danger and risk in the course of his employment, results from the relation of master and servant. "Servants," says *Pollock, C. [*684 B., "are often far better judges than their masters of the dangers incident to their employment, and whether their fellow-servants are trustworthy persons."(a) Neither the decisions nor the dicta in *Paterson v. Wallace*, 1 Macq. 748, *Brydon v. Stewart*, 2 Macq. 80, and *The Bartonshill Coal Company v. M'Guire*, 3 Macq. 300, are at all antagonistic to that principle. In *Mellors v. Shaw*, 1 Best & Smith 437 (E. C. L. R. vol. 101), the master was aware of the unsafe condition of the shaft; the servant was not. [BYLES, J.—There were two defendants there: one was fixed with personal knowledge; the other was not; and both were held liable. Crompton, J., there says: "I have thought *Priestley v. Fowler* rather inconsistent with the later cases on the subject: but, considering what was said by my Brothers in those cases, and seeing, as my Brother Blackburn has pointed out,

(a) And see *Wiggett v. Fox*, 11 Exch. 832. The defendants, having contracted with the Crystal Palace Company to erect a tower, manufactured the materials, and made a contract with Moss and other persons to do by piece-work particular portions of the hoisting and fixing the materials, the scaffolding and tools being provided by the defendants. The workmen employed by the sub-contractors were paid weekly by the defendants according to the time they worked, an account of which was kept by the defendants' foreman. Moss, the sub-contractor, employed the plaintiff's husband; and, whilst he was at work at the bottom of the tower, the defendants' men, who were at work at the top, negligently let fall an instrument called a "rymer," which struck the plaintiff's husband on the head, and caused his death. It was held that the sub-contractor and his workmen were servants of the defendants, engaged in one common employment with their other servants, and consequently that the defendants were not liable under the 9 & 10 Vict. c. 93, for the injury caused by the negligence of the latter.

that the declaration in *Priestley v. Fowler* contained no allegation that
*685] the defendant *knew the defects in the van in which the plaintiff was placed, I conceive that the rule laid down in that case, that a servant on entering the service of an employer takes upon himself the risks of the service, does not apply where there has been personal negligence in the master which causes the injury to the servant. This court said so in *Ashworth v. Stanwix*, 30 Law J., Q. B. 183; and in *Roberts v. Smith*, 2 Hurlst. & N. 213, 218, in the Exchequer Chamber, the rule for a new trial was made absolute, upon the ground that there appeared to have been evidence of 'The personal interference and negligence of the master.'"] Then, the evidence clearly showed negligence on the part of the plaintiff himself. [BYLES, J.—The jury found that against you.] In *Wilkinson v. Fairrie*, 1 Hurlst. & Colt. 633, the plaintiff, a carman, was sent by his employer to the defendants' premises to fetch some goods. After waiting some time, he was directed by a servant of the defendants to go along a passage to a counting-house where he would find the warehouseman. The passage was dark, and in going along it he fell down a staircase and was seriously injured. It was held that the defendants were not responsible, inasmuch as there was no obligation on them to light the passage or fence the staircase. "In general," said Pollock, C. B., "it is the duty of every person to take care of his own safety, and not to walk along a dark passage without a light to disclose to him any danger. As there was no contract, or any public or private duty on the part of the defendants that their premises should be in a different condition from that in which they were, it seems to us that the nonsuit was perfectly right." [WILLES, J.—*Witherley v. The Regent's Canal Company*, 12 C. B. N. S. 2 (E. C. L. R. vol. 104), is to the same effect.] The argument urged on the other side might with equal propriety be urged in the case of a seaman *falling from a ship's
*686] mast or yard. The plaintiff knew when he placed his foot upon the putlog that there was no board there. In *Dynen v. Leach*, 26 Law J., Exch. 221, it was held, that, where an injury happens to a servant while in the actual use of an instrument, engine, or machine, in the course of his employment, of the nature of which he is as much aware as his master, and the use of which is therefore the proximate cause of the injury, he cannot, at all events if the evidence is consistent with his own negligence in the use of it being the real cause,—nor, in case of his dying from the injury, can his representative, under Lord Cambell's Act, 9 & 10 Vict. c. 93,—recover against his master, there being no evidence that the injury arose through the personal negligence of the master: nor is it any evidence of such personal negligence of the master, that he has in use in his works an engine or machine less safe than some other which is in general use. Brainwell, B., there says: "There is nothing legally wrongful in the use by an employer of works or machinery more or less dangerous to his workmen, or less safe than others that might be adopted. It may be inhuman so to carry on his works as to expose his workmen to peril their lives, but it does not create a right of action for an injury which it may occasion, when, as in this case, the workman has known all the facts, and is as well acquainted as the master with the nature of the machinery, and voluntarily uses it." And Channell, B., said: "I rest

my judgment on the ground that the deceased himself continued in the employment of the defendant and in the use of the clip with full knowledge of all the circumstances, so that he directly contributed to the accident." So, in *Senior v. Ward*, 1 Ellis & Ellis, 385 (E. C. L. R. vol. 102), it was held, that, where a servant is injured or killed while in the employ of his master, by *an accident resulting from the habitual negligence of his fellow-servants, known and acqui- [*687 esced in by the master, the master is not liable to an action by the servant, or, if he be killed, by his representative, if the servant has by his own negligence at the time, in knowing and disregarding the danger, materially contributed to the accident.(a)

ERLE, C. J.—I am of opinion that the defendants in these two cases are entitled to judgment. In the first case,—*Lovegrove v. The London, Brighton, and South Coast Railway Company*,—the plaintiff complains of an injury sustained by him under the following circumstances:—He was employed with others in loading ballast into trucks for the company, which were placed on temporary rails laid for that purpose, and shifted as the work progressed by other servants of the company, it being part of the plaintiff's duty to assist in pushing the trucks when loaded along these temporary rails to a spot where an engine waited to receive them. In consequence of the negligent performance of the work by these plate-layers, in not putting a sufficient number of sleepers under the rails, the weight of the truck displaced one of them, and seriously injured the plaintiff. The question is, whether the company are under the circumstances responsible for the damage so caused. It is clear that the plate-layer whose negligence caused it was a fellow-workman of the plaintiff, *and that [*688 both were engaged in one common occupation. The thing to be done, was, to convey the ballast from the pit to the company's line, and the co-operation of the plate-layers and the labourers was necessary to bring about that result. The damage therefore to the plaintiff was caused by the negligence of a fellow-workman or servant. The case of *Waller v. The South Eastern Railway Company*, 2 Hurlst. & Colt. 102, appears to me to be decisively in point, and to be even a stronger case than the present. It was there held that a railway company is not liable for an injury to the guard of a train, occasioned by the negligence of the ganger of the plate-layers in [not] keeping the permanent way in proper repair and condition; the two servants being engaged in one common object, viz. the safe conduct of the passengers on their journey. There, the two servants were employed in services much more dissimilar than those in the present case; but yet they were held to be fellow-servants within the rule which has prevailed since the case of *Priestley v. Fowler*, 3 M. & W. 1; and, there being no default or negligence on the part of the company, the company were held not to be liable. Here, there was no evidence to fix the company with knowledge of the defective manner in which the temporary rails were laid, or with want of due and reasonable

(a) See *Ormond v. Holland*, E. E. & B. 102 (E. C. L. R. vol. 96). See also *Holmes v. Worthington*, 2 Fost. & F. 533. It was there held, that, where a servant, knowing of a defect in machinery he has to work in his master's employ, complains of it to him, but continues in the use of it, in the reasonable expectation of its being repaired, and an accident happens through its defective condition, he is not precluded from recovering against his master for negligence.

care in the selection of the persons by whom that duty was performed. The authority I have referred to seems to me entirely to dispose of the first case.

In *Gallagher v. Piper*, the plaintiff, who was a scaffolder, brought an action against the defendants, who are master-builders, for an injury sustained by him by reason of the insufficiency of the supply of materials for the safe performance of the work upon which he was engaged,—the plaintiff having been obliged to place his foot upon a *689] putlog with a round surface, *instead of a board or plank which ought to have been laid over it, and having in consequence slipped and fallen from a considerable height. The ground upon which the plaintiff rests his claim is this:—One Phear was the defendants' foreman or manager at the work in question, a large building in Leadenhall Street. One Mahoney was employed under him as foreman of the scaffolders; and the plaintiff worked at the raising of the scaffolding under the orders of Mahoney. It was Phear's duty to supply the materials, consisting of poles, putlogs, and boards, for the rearing of the scaffolding. He had notice through Mahoney that the supply of these materials for the due and safe performance of the work was insufficient; and the cause of the injury sustained by the plaintiff was Phear's omission to supply proper and sufficient materials upon Mahoney's requisition. I am very desirous that the plaintiff should have compensation for the injury he has sustained, if the law would allow it. But I cannot with my utmost power distinguish *Wigmore v. Jay*, 5 Exch. 354, from the present case. There, *Wigmore* was employed by *Jay*, a master-builder, on an extensive work which he was building, and, in consequence of a rotten putlog having been used in the construction of the scaffolding upon which the plaintiff was working, the scaffolding gave way, and he was precipitated to the ground and severely injured. It appeared that the person who was responsible for the erection of the scaffolding was the defendant's foreman, and that the defendant himself was ignorant of the defective state of the putlog; and, as the defendant was guilty of no default either in respect of the materials of which the scaffolding was composed or in the selection of the foreman, he was held not to be liable. That case appears to me to be precisely in *690] point. The only matter upon which I pause, is, *whether or not Phear was such a general manager as to make him stand in the place of Messrs. Piper, so that what was said to Phear may be considered as having been said to them. Is there anything to show that Phear the foreman or manager more represented his employers here than the foreman did in *Wigmore v. Jay*? In each case the defendants were engaged in very extensive works, and in each a foreman or manager was employed to direct them, and to whom the workmen looked for their instructions. In this case, beyond a doubt, Phear, the manager, was guilty of negligence in the performance of his duty: he had repeated notices that there were not sufficient materials for the erection of the scaffolding, but failed to supply them. But I think Phear and the plaintiff were fellow-workmen within the principle laid down in the cases I have referred to. There was no evidence of any default on the part of the defendants themselves either as to the supply of sufficient materials or in the selection of

Phear to be their foreman or manager: and the neglect of Phear imposes no responsibility upon them. The rule in this case, therefore, will be absolute to enter a nonsuit.

WILLIAMS, J.—I am of the same opinion. As to the case of *Lovegrove v. The London, Brighton, and South Coast Railway Company*, it appears to me to be impossible to distinguish it in principle from the rule established in *Priestly v. Fowler*, and acted upon in numerous cases since, and particularly in this court in *Searle v. Lindsay*, 11 C. B. N. S. 429 (E. C. L. R. vol. 103), and in the Court of Exchequer more recently in *Waller v. The South Eastern Railway Company*, 2 Hurlst. & Colt. 102. The injury which the plaintiff sustained was attributable solely to the negligence of a fellow-workman employed with him in the performance of the *same work, and there was [*691 no negligence imputable to the company. With respect to *Gallagher v. Piper*, I have felt more difficulty, not as to the law, but as to its application to the facts of the case. But, assuming Phear to be a fellow-workman of the plaintiff, the case of *Wigmore v. Jay*, 5 Exch. 354, is a conclusive authority in favour of the defendant. But the doubt I entertain is whether Phear was not rather a sort of deputy-master than a fellow-workman of the plaintiff, so that a notice of the insufficiency of the materials to him would be notice to the defendants themselves. Looking, however, at the evidence here, I do not find enough to warrant the conclusion that Phear was intended to stand in the place of the defendants, so as to bind them by his acts or omissions in this respect.

WILLES, J.—In the case of *Lovegrove v. The London, Brighton, and South Coast Railway Company*, there can be no doubt that the person injured and the person whose negligence caused the injury were fellow-servants. Mr. Lionel Smith well pointed out that the only ground upon which the plaintiff could sustain this action, was, either that there was some evidence that the company were guilty of negligence in employing an incompetent person to lay the rails, or that the burthen of showing his competency rested on the defendants, and that the plaintiff was not called upon to prove his incompetency. Now, was there any evidence that the company did employ an incompetent person? The only evidence was, one act of negligence committed by that person: he once omitted to use due and proper care in doing the work intrusted to him. If that (which I venture to doubt) is evidence of incompetency, it certainly was not evidence that the company knowingly employed an incompetent *workman. [*692 Then, is the burthen of proof of the workman's competency cast upon the master? I apprehend not. There is nothing to differ this from ordinary cases. It is not enough for the plaintiff to show that he has sustained an injury under circumstances which may lead to a suspicion, or even a fair inference, that there may have been negligence on the part of the defendant; but he must go on and give evidence of some specific act of negligence on the part of the person against whom he seeks compensation. That is well explained by Erle, C. J., in *Cotton v. Wood*, 8 C. B. N. S. 568 (E. C. L. R. vol. 98).^(a)

(a) And see the judgment of Williams, J., in *Tooney v. The London, Brighton, and South Coast Railway Co.* 3 C. B. N. S. 146 (E. C. L. R. vol. 91). And see *Hammack v. White*, 11 C. B. N. S. 588 (E. C. L. R. vol. 103).

In this case, therefore, I entirely agree with my Lord that the rule should be discharged.

As to the case of *Gallagher v. Piper*, there seems no room for doubt that there had been neglect on the part of the person who has been described as the foreman or general manager of the defendants' works, and that that neglect conduced to the injury of which the plaintiff complains. The plaintiff, it appears, was employed as a labourer in putting up a scaffolding for the erection of certain buildings which the defendants were employed to erect,—being engaged in the usual way by the foreman of the scaffolders on their behalf. He complained to the foreman, Mahoney, that the materials furnished to him for the work were deficient in quantity. His complaint reached Phear, the general manager, but nothing was done; and, in consequence of this insufficiency of materials, the work was rendered more than commonly hazardous, and the plaintiff was injured. It is said that the plaintiff might have refused to go on with the work until proper materials *693] were supplied: but the jury found *that he was guilty of no negligence in thus exposing himself to increased hazard. A man can hardly under such circumstances be considered as a volunteer. If the notice which was given to Phear had been given to the defendants, and they had been guilty of the neglect of which he was guilty, there can be no doubt that the plaintiff would have been entitled to recover. The rule laid down in *Priestley v. Fowler*, 3 M. & W. 1, and I apprehend long before that case, obviously does not apply to negligence on the part of the master himself. For that *Roberts v. Smith*, 2 Hurlst. & N. 213, is an authority.(a) But here the *694] notice was given, not to the masters, but to the foreman. If *Phear had been a partner with the defendants, notice to him would have rendered them liable; for, the case would not then have fallen within the rule illustrated by *Priestley v. Fowler* and that class of cases. But here we are dealing with a case where the person whose negligence caused the injury is a servant of the persons sought to be charged. It is true, he filled a superior position: but still he was a servant; and I am unable to draw any distinction in this respect between one description of servant and another, so long as the relation of master and servant exists, and the party injured and the person whose negligence caused the injury are employed under one common master. If this had been the case of a person who might be

(a) There, the declaration stated that the plaintiff, a bricklayer, entered into the service of the defendants upon the terms that they should take and use all due, reasonable, and proper means and precautions in order to prevent accident, damage, or injury, or unreasonable or unnecessary risk or damage from happening or occurring to the plaintiff in the performance of his duty as such servant; that the defendants did not take such reasonable precautions, and, by reason thereof, and of the neglect of duty of the defendants, the plaintiff was employed on a scaffold which, for want of such precautions, was rotten and unsafe, which the defendants knew, and whereof the plaintiff was wholly ignorant, and in consequence thereof a part of the scaffold broke, and the plaintiff fell to the ground. Pless,—not guilty, and a traverse of the employment on the terms alleged. At the trial it was proved that the defendants had employed a labourer to erect the scaffold. The materials for the scaffold were in bad condition. The labourer broke several of the putlogs in trying them. One of the defendants told him to break no more, that the putlogs would do very well. The labourer used such as he thought sound. One of the putlogs so used having given way, the scaffold fell, and the plaintiff was injured. Upon this evidence, the judge at the trial directed a nonsuit: it was held, on appeal to the Exchequer Chamber, that there was evidence to go to the jury of the liability of the defendants.

said to have authority to act for the master as a kind of universal agent, I should have been prepared to consider the suggestions thrown out by my Brother Byles in his judgment in *Clarke v. Holmes*, 7 Hurlst. & N. 937, 949, and see whether he could come within the denomination of servant at all. But, before I could bring myself to say that such an agent did not come within the rule, I should take time to look into the subject, and especially to consider the position of that most authoritative of all agents, the master of a ship. I should like to consider whether, if the master of a ship, without the knowledge of his owners, were to start from an intermediate port with the vessel in a damaged and unseaworthy condition, and she was in consequence driven on shore or upon a rock, and some of the crew thereby sustained personal injury, it would be just or reasonable to hold the owners to be liable to the sailors, as they would undoubtedly be to third persons. But it is unnecessary to discuss that here; for, it is plain that Phear was as much a servant of the defendants as was any one of the labourers employed under his direction and control. If authority for this be wanting, it is found in the case of *Wigmore v. Jay*, *5 Exch. 354. There the person whose negligence caused the misfortune was employed by the defendant as foreman in the erection of a large work,—the hall of the London University. The rule laid down by the Chief Baron there was, that, as the defendant had not personally attended to the erection of the scaffolding, (a) the action could not be maintained. I apprehend, that, without overruling that case, or acting upon some distinction which the facts here do not warrant, we could not allow this verdict for the plaintiff to stand. I therefore think that in this case the rule to enter a nonsuit must be made absolute.

BYLES, J.—In the case of *Lovegrove v. The London, Brighton, and South Coast Railway Company*, I concur with the rest of the court in thinking that the rule must be discharged, feeling it to be quite impossible to distinguish it from the numerous cases which have been referred to upon the subject.

With respect to the case of *Gallagher v. Piper*, however, though no doubt I am wrong, I entertain a very strong opinion that the verdict was right, and I feel bound to express that opinion. The facts were these:—The plaintiff was employed to erect a scaffolding. He was not supplied with sufficient materials for the purpose. He applied to Mahoney, the foreman of the scaffolders, for additional boards. Mahoney applied to Phear, who was the general manager of the works, and he was told that there were plenty of boards, and that the plaintiff must get on as he best could. The plaintiff accordingly proceeded with his work, and for want of a proper supply of materials he lost his footing, and the result is that he is disabled for life. The jury found a verdict for the plaintiff with 100% *damages: and they further found these facts, which I consider to be very material elements for a right determination of this question,—first, that it was the defendants' duty (their *personal* duty) to provide a safe and sufficient scaffold,—secondly, that the scaffolding provided was insufficient and unsafe,—thirdly, that it was not insufficient and un-

(a) Or intrusted the duty of doing so to one whom he knew not to possess competent skill for the purpose.

safe to the personal knowledge of the defendants, but that it was insufficient and unsafe to the knowledge of Phear, the general manager of the defendants, and also to the knowledge of Mahoney, the foreman of the scaffolders. The jury further found that the plaintiff was guilty of no negligence either in the act itself or (in the opinion of the majority) in his mode of doing it. The question is, whether under these circumstances the verdict of the jury is to be set aside. It is material in the first place to consider the position of Phear. As I understood the evidence, he was not merely the foreman or manager *pro hac vice*, but had been the general manager of the defendants' works for many years, about twenty-four or twenty-five years. He had the entire management of the men employed under him, engaging them and dismissing them as he thought fit; Mahoney being employed under him as foreman of the scaffolders. It is said that Phear stood in the relation of fellow-servant to the plaintiff. I am bound to say that I think otherwise. He was acting-master. At all events, there was evidence for the jury that such was his position. Take the case of a large builder, who is never seen near his works, but who trusts the entire conduct of his business to a foreman or manager, who is eyes, ears, tongue, brains, and everything to him. Is not the master liable for acts of negligence of his employé,—for, I will not use the term "servant," which like that of "foreman," is susceptible of many meanings,—whilst acting thus for him? If these defendants had been a corporation aggregate *697] they must have employed somebody to represent them. Take the case of a railway company employing a general traffic-manager, and through his negligence an accident happens to a servant of the company,—is it to be said that the party injured is without remedy, because the corporation is incapable of personal misconduct? If the rule here relied on be found so inconvenient that it cannot be applied to a case like that, ought it to be applied here? That depends very much upon the position of Phear. If he had been a servant, though a superior one, I should have entertained some doubt. But I do not think he stood in the position of a servant at all. He stood rather in the position of a general agent for the defendants. It is true he was called the foreman: but that is a word the meaning of which is extremely various. The case of *Wigmore v. Jay*, 5 Exch. 354, is distinguishable in this, that there it does not appear that the person whose negligence caused the accident was anything more than foreman for the particular work. For these reasons, I think notice to Phear and negligent misconduct of Phear would be notice to the defendants and negligence or misconduct of the defendants. Personal knowledge is not indispensable; for, it has been held that notice to one of two partners is notice to both.^(a) So here, I cannot help thinking that notice to Phear was notice to the defendants. Upon that ground, with the greatest deference to my Lord and my two learned Brothers, I am of opinion that this verdict ought to stand. There is also another ground upon which I conceive this verdict might be rested, viz. that it was the defendants' duty to supply a sufficient quantity of materials from which the foreman

(a) *Roberts v. Smith*, 2 Hurlst. & N. 213, and *Mollors v. Shaw*, 1 Best & Smith 437 (E. C. L. R. vol. 101).

could furnish what was necessary to the scaffolders. There was no *evidence that Phear had authority to lay out money in the purchase of materials for that purpose. Upon the whole, there- [*698 fore, it seems to me that there was evidence to go to the jury of personal nonfeasance, if not of personal misfeasance, on the part of the defendants, so as to entitle the plaintiff to retain this verdict. The majority of the court, however, being of a different opinion, a non-suit must be entered.

The result will be, that, in *Lovegrove v. The London, Brighton, and South Coast Railway Company*, the rule will be discharged, and in *Gallagher v. Piper* the rule will be made absolute.

Rules accordingly.

The subject of the liability of a master to his servant for injuries resulting from the negligence of a fellow-servant, has been so exhaustively treated in the note to the case of *Waller v. South-Eastern Railroad*, 2 H. & C. 102, that it is unnecessary in the present note to do more than refer to such cases as have been since decided.

In *Morgan v. Vale of Neath Railway*, Law Rep. 1 Q. B. 148, a distinction was endeavoured to be made, on the ground that the employee causing the injury was engaged in an entirely different department of the same general service, to the party injured, but the rule was fully sustained, the Court saying, "that the *common object* in which the servants are employed being the same, is all that is necessary, without its being the *common immediate object*."

Erle, C. J., in his opinion in *Tunney v. Midland Railway Co.*, Law Rep. 1 C. B. 291, one of the latest English cases, says, "The rule has been settled by a series of cases beginning with *Priestly v. Fowler* and ending with *Morgan v. Vale of Neath Railway*, that a servant when he engages to serve a master undertakes as between himself and his master to run all the ordinary risks of the service, including the negligence of his fellow-servants." And this seems to be pretty generally established as the rule in America, according to recent decisions: *Caldwell v. Brown*, 3 P. F. Smith 453; *Weger v. Penna. Railroad Co.*, 5 Id. 460;

O'Donnell v. Allegheny Railroad, 10 Id. 239; *Felch v. Allen*, 98 Mass. 572; *Gilman v. Eastern Railroad Corporation*, 10 Allen 233; *Faulkner v. Erie Railway Co.*, 49 Barb. (N. Y.) 324; *P., Ft. W. & C. Railway Co. v. Deviney*, 17 Ohio 197; *Ohio and Mississippi Railroad v. Hammersley*, 28 Ind. 371. But in *Burke v. Norwich and Worcester Railroad*, 34 Conn. 474, the Court say, "However plausible the rule that a servant calculates the risk of the negligence of his fellow-servants, and the danger from the machinery, in estimating the value of his services, may be in theory, it is very doubtful in fact, if a spinner in a factory or a fireman on a railroad ever made an examination into the condition of the machinery or the mode of conducting the business, with a view to ascertain the extent of his risk; and as a question of policy it is by no means certain that the public interest would not be better subserved by holding the superior to the strictest accountability for the misconduct of his subordinates whoever is the sufferer."

In *Feltham v. England*, Law Rep. 2 Q. B. 32, where the servant injured was under the *direct control* of the defendants' foreman, an attempt was made to exclude the application of the rule, on the ground that the foreman was an *alter ego* of the master and not a fellow-servant, but it failed, the Court holding that the foreman or manager was not in the sense contended for, the representative of the master. See *Hunt v. Penna. Railroad*, 1 P. F. Smith 475.

WEBBER v. STANLEY. April 21.

1. For the purpose of construing a will, the court must be informed of the circumstances surrounding the testator when making his will,—such as his family status and the nature of his property. Extraneous evidence of these matters is therefore admissible.

2. One T. A. S., being seised of an estate in Wales worth about 46,000*l.* a year, and also of freehold estates partly in Hants and partly in Wilts (worth about 4500*l.* a year), which were known as his “Tedworth estate,” by his will in 1857,—after giving certain annuities (including one of 50*l.* for life to his valet A.), which he charged upon “all his lands and hereditaments at or near Tedworth,”—devised to his widow in fee “all his lands and hereditaments at or near Tedworth aforesaid.”

The widow, by her will, dated in 1858, after disposing of her Welsh estate, subject to a charge of 40,000*l.* to be raised thereout, which sum she declared that she intended to be “an addition to her Tedworth estates thereafter devised,” proceeded as follows,—“I give and devise my mansion-house at Tedworth, in the county of Hants, and all my manors, farms, lands, tenements, and hereditaments in the county of Hants, devised to me by the said will of my said late husband (subject to the annuities charged thereon by such will, and subject to an additional or further annuity of 50*l.* per annum to be payable to A., the valet of my late husband, during his life, as hereinafter mentioned), and all other hereditaments in the said county of Hants of or to which I shall be seised or entitled, or as to or over which I shall have a disposing power by my will at my death (all which hereditaments in the county of Hants are hereinafter described or referred to as my Tedworth estate),” to the use of her nephew, the defendant, for life, &c.

She then proceeded to give the tenant for life the power of charging “her said Tedworth estate” for jointures and provisions for younger children to a limited extent. Throughout the will the testatrix spoke of the property she was dealing with as “my said Tedworth estate:” and she directed that the mansion-house and grounds should be kept up in their then present state, and made the furniture, &c., heir-looms. She then directed that the 40,000*l.* charged upon the Welsh property should be laid out in the purchase of freehold lands, &c., near to or adjoining her said Tedworth estate, or elsewhere in the said county of Hants, or in some adjoining county or counties, and charged the additional annuity to the valet A. upon “all her hereditaments at or near Tedworth aforesaid.”

The mansion-house at Tedworth and a portion only of the lands forming the Tedworth estate (of the annual value of about 2000*l.*) were in the county of Hants; the residue (of the annual value of about 2500*l.*) being in the adjoining county of Wilts. There was no boundary, either natural or artificial, to separate the two counties; and some of the farms were partly in Hants and partly in Wilts, the county boundary in some instances dividing fields, and even separating cottages from their gardens. The mansion-house of Tedworth was largely disproportionate to the Hants part of the property, even when increased by the legacy of 40,000*l.*:—

Held, that, as there was a property which every part of the description “my mansion-house at Tedworth, in the county of Hants, and all my manors, farms, lands, &c., in the county of Hants,” fitted, and on which every word had full effect, the devise must be limited to so much of the land as was locally situated within the county of Hants,—there being no intention expressed of giving property situated out of the county of Hants.

THIS was an action of ejectment brought by the plaintiff to recover possession of certain lands in the county of Wilts, which he claimed as heir at law of Mrs. Assheton Smith, deceased.

*699] *The cause was tried before Willes, J., at the last Summer Assizes for the county of Wilts. The material facts were as follows:—

In and prior to the year 1774, Thomas Assheton Smith, then of Tidworth, otherwise Tedworth House, in the county of Hants, was seised in fee simple of the manor of South Tidworth, in the county of Hants, and the manor of North Tidworth, in the county of Wilts, and of various freehold farms, lands, tenements, hereditaments and premises, in the county of Hants, which comprised, with the glebe-land there, the whole of the parish of Lower Tidworth, and of various freehold farms, lands, and premises in the county of Wilts, comprising a portion of the parish of Upper Tidworth; and which manors and hereditaments in the counties of Hants and Wilts adjoined

each other, and, together with certain premises held by the said Thomas Assheton Smith for terms of years, and which adjoined the said freehold premises, formed and were known as "the Tedworth estate."

The said Thomas Assheton Smith was desirous of adding to the said Tedworth estate; and, in order thereto, he in or about the year 1796 purchased a farm forming portion of the parish of Upper Tidworth, in the county of Wilts, and laid the same to the *Tedworth estate, and the same was known as and formed a portion [*700 of the said Tedworth estate.

The said Thomas Assheton Smith continued from the period aforesaid down to the time of his death seised and possessed of the said Tedworth estate, consisting of the particulars aforesaid; and the said Thomas Assheton Smith died in the year 1828, and was succeeded in the entirety of the said estate as well freehold as leasehold by his son Thomas Assheton Smith.

The said Thomas Assheton Smith the son became desirous to add to the said Tedworth estate all such manors and hereditaments in the parish of Upper Tidworth as had not theretofore formed part of the Tedworth estate: and, in or about the year 1833, the said Thomas Assheton Smith (the son) purchased the manor and estate of Tidworth Zouch, forming part of the parish of Upper Tidworth, in the county of Wilts, and laid the same to the Tedworth estate; and thenceforth the whole of the lands forming the parish of Upper Tidworth, in the county of Wilts, with the exception of the glebe-land there, was known as and formed part of the Tedworth estate.

The said Thomas Assheton Smith (the son) continued from the periods aforesaid seised and possessed of the said estates as well freehold as leasehold, and which, as aforesaid, were together known as and formed the Tedworth estate, down to and at the time of his death.

The freehold portion of the Tedworth estate situate in the county of Hants consists of the manor of South Tedworth, the mansion-house called Tedworth House, with the park thereto, and about 3500 acres of land, all of which, except the mansion-house and park, are of the present annual value of 1650*l.* or thereabouts; and the leasehold portion of the Tedworth estate situate in the *county of Hants [*701 consists of lands in the parish of Shipton adjoining the lands in the parish of Lower Tidworth, and which are of the annual value of 287*l.* or thereabouts. The freehold portion of the Tedworth estate situate in the county of Wilts consists of the manor of North Tidworth, the manor of Tidworth Zouch, and about 3054 acres of land of the annual value of 1600*l.* or thereabouts; and the leasehold portion of the Tedworth estate situate in the county of Wilts consists of certain tithes of the annual value of 950*l.* and 65*l.* respectively, or thereabouts: and the total annual value of the said Tedworth estate, freehold and leasehold, is 4500*l.* or thereabouts.

The mansion-house of Tedworth is of great extent, with large gardens and pleasure-grounds attached thereto, and would require an expenditure of more than 6000*l.* a year properly to keep it up in its present condition.

The only manor in the county of Hants which formed part of the Tedworth estate is the manor of South Tidworth, with the exception

of a property called Doyley Wood, consisting of about 650 acres of woodland, hereafter mentioned.

The whole of the lands where the counties of Hants and Wilts unite at Tedworth are of freehold tenure. No natural or artificial boundary has within living memory existed between Upper Tidworth and Lower Tidworth, or any part thereof, nor between the counties of Hants and Wilts where the same unite at Tidworth: but the two parishes of Upper Tidworth and Lower Tidworth have for several years past been treated in many respects as one parish,—having one school for the two parishes. The lands on the boundary line of the counties of Wilts and Hants at Tidworth have for many years been and now are intermixed and are held together under the same ten-
 *702] ancies at entire rents, and *several cottages on the freehold portion of the Tedworth estate are in the county of Hants, having gardens attached thereto which are partly in Hants and partly in Wilts; and allotment lands granted to the tenants of these cottages are in the county of Wilts.

Thomas Assheton Smith (the son) was also prior to and at the time of his decease seised in fee simple of a mansion-house at Vaenol, near Bangor, in Wales, and of various manors, messuages, farms, lands, quarries, and hereditaments of great extent, and of the yearly value of 46,000*l*.

Being so seised and possessed, the said Thomas Assheton Smith by his will bearing date the 22d of July, 1857, after giving certain annuities,—one of them being an annuity of 50*l*. for life to his valet Atwell,—all which annuities he charged on and directed to issue out of “all his lands and hereditaments at or near Tedworth,”—gave and devised, charged as aforesaid with the payment of all the said annuities, “all his lands and hereditaments at or near Tedworth aforesaid, unto his dear wife and her heirs for her own absolute use and benefit:” to whom he also gave, devised, and bequeathed all other his real estate and all his personal estate: and he appointed her sole executrix.

He died on the 15th of September, 1858.

His widow, the testatrix, Matilda Assheton Smith, by her will dated the 9th of November, 1858, was described as “of Vaenol, in the county of Carnarvon, and of Tedworth, in the county of Hants, widow of Thomas Assheton Smith, Esq., late of Vaenol and of Tedworth aforesaid, now deceased.” The first devise was as follows:—“I give and devise the mansion-house at Vaenol, near Bangor, and all the manors, messuages, farms, slate-quarries, lands, tenements, and hereditaments, in the principality of Wales, devised to me by
 *703] *the will of my said late husband, and all other hereditaments in the said principality (if any), of or to which I shall be seised or entitled, or as to or over which I shall have power of disposition by my will at my death, To the uses, upon the trusts, and subject to the provisos, powers, and directions hereinafter expressed or contained concerning the same, that is to say, to the use of Frederick Drummond, Esq., and Thomas Best, Esq. (*the trustees for my Tedworth estate, hereinafter devised*), their executors, administrators, and assigns, for the term of five hundred years, computed from the day of my death, without impeachment of waste, for the purpose of raising from and out of my said Welsh estates by or under the trusts hereinafter declared

of the said term the sum of 40,000*l.*, and for raising or securing interest thereon at the rate of 4*l.* per centum per annum in the meantime; and, from and after the expiration of the said term of five hundred years, and in the meantime subject thereto and to the trusts thereof, To the use of George Duff, the eldest son of Mary Duff (who is a niece of my said late husband), for his natural life, without impeachment of waste,"—remainder to his first and every other sons, &c. "And as to the said term of five hundred years limited to the said Frederick Drummond and Thomas Best as aforesaid, I declare that the said Frederick Drummond and Thomas Best, their executors, administrators, and assigns, shall be possessed thereof upon trust that they the said trustees, or the survivor of them, or the executors or administrators of such survivor, or their or his assigns, shall at such time after my death as shall be found convenient, by mortgage of all or any part of the said hereditaments or estates comprised in the said term of five hundred years for the whole or any part of the same term, raise the said sum of 40,000*l.*, *which I intend to be an addition *to my Tedworth estates hereinafter* [*704 *devised*, and to be disposed of accordingly in manner herein- after directed, shall for the purpose of so as aforesaid raising the said sum of 40,000*l.* by such mortgage as aforesaid secure to or for the mortgagee or mortgagees as well the principal money to be raised or borrowed as interest for the same at such rate as shall be then agreed on, but not exceeding 5*l.* per centum per annum; and upon trust in the meantime until the raising of the said sum of 40,000*l.*, shall pay or retain to themselves or himself, the said trustees or trustee, interest at the rate of 4*l.* per centum per annum by or from the annual rents and profits of the said hereditaments, and shall stand and be possessed of the said sum of 40,000*l.* so to be raised as aforesaid, and the said interest for the same in the meantime, upon the trusts hereinafter declared concerning the same; and upon further trust as to the said term of five hundred years, and the hereditaments comprised therein, subject to the trusts aforesaid for raising the said sum of 40,000*l.* and for the payment in the meantime of the interest thereon, shall stand and be possessed thereof upon trust to permit the person or persons for the time being seised of or entitled to the said hereditaments under the limitations aforesaid to possess and enjoy the same, or to receive the rents and profits thereof: Provided always, and I direct, that when the said sum of 40,000*l.* shall have been fully raised, and the interest for the same in the meantime shall have been fully paid, &c., the said term of five hundred years shall cease and determine, except only as to the hereditaments comprised in any such mortgage: And, subject and without prejudice to the same mortgage, I give and bequeath unto John Griffith and John Astley (the trustees for my Welsh estates aforesaid) all my plate at Vaenol and Tedworth aforesaid and elsewhere, and all my furniture and other effects *in [*705 and about the mansion at Vaenol, and all my farming stock in Wales, and also all the plant and machinery, including rails, locomotives, steam-vessels, and other personal property (except bills and money) used for or connected with the said quarries or other hereditaments hereinbefore devised, and also all slate severed and not sold, upon trust that they the said trustees of my said Welsh estates, or the survivor of them, or the executors or administrators of such survivor,

tate in possession or not, either in contemplation of marriage or after marriage, by deed revocable or irrevocable, or by her will *709] *or any testamentary writing, to appoint (but without prejudice to any prior subsisting uses or powers) to or in favour of any husband whom she shall marry or have married, any yearly rent-charge not exceeding 500*l.* to be issuing out of *my said hereditaments comprised in my said Tedworth estate or any part thereof*, and to be payable during his life, with such powers and remedies for securing the same rent-charge as are authorized to be created by the power of appointing jointures lastly hereinbefore contained; such appointed estate or yearly rent-charge to commence from the decease of the appointor, but no yearly rent-charge to be appointed under this power shall take effect as an actual estate or charge, unless the appointor shall be or afterwards become entitled in possession to the said hereditaments, or would if living have been so entitled under the limitations herein contained: Provided, always that, if the lastly mentioned hereditaments would under the two last powers be liable at any one time to the payment of a larger yearly sum in the whole than 1000*l.*, then the posterior charge or charges shall not take effect or shall only partially take effect in possession until the amount of the previous charge shall cease or be diminished, so as always to limit the existing annual charge to the sum lastly specified. I empower every tenant for life under the limitations herein contained as to *my said Tedworth estate*, whether entitled in possession or not, by deed revocable or irrevocable, or by his or her last will, or any testamentary writing, to appoint (but without prejudice to any jointure rent-charge to be limited to the wife or husband of such tenant for life under any power hereinbefore contained) *my said hereditaments comprised in the said Tedworth estate, or any part thereof*, to any trustee or trustees, for any term of years, without impeachment of waste, upon proper trusts, and with and *710] *under proper powers and provisions for raising (otherwise than by sale) for the child or children of the tenant for life so appointing, other than an eldest or only son or an eldest or only daughter, entitled to the inheritance of the said hereditaments under the limitations aforesaid, a portion not exceeding 5000*l.* for one child, or portions not exceeding in the whole 10,000*l.* for two children, or 15,000*l.* for three children, or 20,000*l.* for four or more children, with maintenance not exceeding interest at the rate of 4*l.* per cent. per annum on such portion or portions; but the term to be created as last aforesaid shall be subject to a proper proviso for cesser, and the trusts thereof shall not be capable of being executed, unless the appointor or his or her issue shall be or shall afterwards become entitled in possession to *the said hereditaments* under the limitations aforesaid; and, if *the said hereditaments* would by reason of the exercise of this power be liable at any one time to the payment of a larger principal sum in the whole than 40,000*l.*, then the charge or charges posterior in point of title shall be wholly or partially suspended: Provided always that it shall be lawful for the said trustees for *my said Tedworth estate*, or the survivor of them, his executors or administrators, with the consent in writing of the person for the time being entitled in possession as the beneficial tenant for life, or as tenant in tail, under the limitations herein contained as to *my said Tedworth estate* to sell *my said hereditaments* comprised in

*such estate, or any part thereof, together or in parcels, by public sale or private contract, or to exchange my said hereditaments, or any part thereof, for other hereditaments or tenements of the description hereinbefore authorized to be purchased, or to make partition of any hereditaments whereof an undivided share or shares is or are included in my said Tedworth estate hereby devised, *with liberty to give or* [*711
*accept any sum or sums of money for equality of exchange or partition; and, in or upon any such sale, exchange, or partition as aforesaid, the surface and the minerals, mines, and quarries in or under the same may be disposed of together or separately, or the said minerals, mines, and quarries, or any of them, may be reserved, and such powers, provisions, and agreements may be reserved, given, and entered into as the persons or person exercising this power shall think fit; and, upon every such sale, exchange, and partition, the same trustees or trustee may by deed make such revocation of the uses of my will, and such appointment of new uses, as shall be proper for effecting the sale, exchange, or partition; and I declare that the same trustees, or the survivor of them, his executors or administrators, may apply the money to be received from such sale, exchange, or partition as aforesaid, in the first place, in discharging the encumbrances (if any) which shall then affect my said Tedworth estate, or the hereditaments comprised therein, and shall lay out the money so received and not so applied in the purchase of freehold hereditaments in fee simple in possession, situate in England or Wales, or of copyhold or customary or leasehold tenements (such leasehold to be held for a term of years absolute whereof at least eighty years shall be unexpired) convenient to be held with the hereditaments comprised in, my said Tedworth estate, or to be acquired under this provision, or the trusts or directions hereinafter contained, and shall settle or cause to be settled as well the hereditaments and tenements so to be purchased as the hereditaments and tenements to be acquired by means of any such exchange or partition as aforesaid, to and upon such of the uses and trusts, and subject to such of the provisions herein limited or expressed concerning the freehold hereditaments comprised in my *Tedworth estate* [*712
*hereinbefore devised as shall be subsisting, or as near thereto as may be, but so as not to vest absolutely the chattels real to be so settled in any tenant in tail of the freehold hereditaments who shall die under the age of twenty-one years without leaving issue in tail living at his decease," &c. "And as to and concerning the said sum of 40,000*l.* hereinbefore directed to be raised from and out of my said Welsh estates under the trusts of the said term of five hundred years hereinbefore limited therein, and the interest of the same sum until the raising thereof, I direct that the said F. Drummond and T. Best, their executors, administrators, and assigns, shall stand and be possessed thereof upon trust that they the same trustees, or the survivor of them, or the executors or administrators of such survivor, or their or his assigns, do and shall lay out the said sum of 40,000*l.* in the purchase of freehold lands and hereditaments near to or adjoining my said Tedworth estate, or elsewhere in the said county of Hants, or in some adjoining county or counties, of an indefeasible estate of inheritance, which lands and hereditaments so to be purchased shall be an accretion to my Tedworth estate, and shall be conveyed or assured and limited and*

settled to the same uses, and subject to, with, and under the same provisoes, powers, declarations, and directions as are hereinbefore expressed or contained concerning *my said Tedworth estate*, or the hereditaments comprised therein, including in particular the said power of sale, or such of the same uses, provisoes, powers, declarations, and directions as shall be then subsisting or capable of taking effect, but so that any annual charges thereby authorized be not doubled or increased." "I give and bequeath unto the said F. Drummond and T. Best, their heirs, executors, and administrators, all my furniture and effects in *my said mansion-house at Tedworth aforesaid* (except the *713] plate), *and also all the farming-stock and other effects belonging to me at Tedworth aforesaid, upon trust that the same trustees, or the survivor of them, or the executors or administrators of such survivor, or their or his assigns, shall sell and dispose of the same farming-stock and other effects above associated therewith, and shall be possessed of the proceeds thereof upon trust to dispose thereof in the manner hereinbefore directed concerning the said sum of 40,000*l.*: And, with respect to the said furniture and other effects in *my said mansion-house at Tedworth hereinbefore bequeathed*, I direct that the same shall be annexed to and go with the same mansion-house as heirlooms, and be enjoyed by the person or persons for the time being beneficially entitled to the same under the limitations hereinbefore contained concerning *my said Tedworth estate*, but so that such heirlooms shall be subject to an executory limitation over on the death of each tenant in tail-male or tail-general by purchase under the age of twenty-one years without leaving issue in tail-male or tail-general (as the case may be) living at his or her death, to or in favour of the person or persons entitled under the subsequent limitations concerning the same estate," &c. And, after giving various legacies, the testatrix proceeded,—“I give to Atwell, the valet of my late husband, an annuity of 50*l.*, to be payable to him during the term of his natural life, and to be issuing out of and charged upon *all my hereditaments at or near Tedworth aforesaid*, such annuity to be payable quarterly, on the same days as an annuity payable to him under my husband's will is made payable, and the first quarter to be paid on such of the said quarter-days as shall happen next after my decease.” * * * “And I give and bequeath all the residue of my personal estate to my sister, the said Harriet, wife of the said G. W. Heneage, absolutely, for *714] her sole and *separate use, free from the debts or control of her said husband.”

It was admitted that the defendant was at the date and issuing of the writ in actual possession of the premises sought to be recovered; that Thomas Assheton Smith, the husband of the testatrix Matilda Assheton Smith, died on the 15th of September, 1858; that Mrs. Assheton Smith died on the 18th of May, 1859, seised of the several premises sought to be recovered in this action; and that the plaintiff was the heir at law of Mrs. Smith.

The heirship being admitted, the defendant began.

The admissions having been read, and the provisions of Mrs. Smith's will fully stated, as well as a judgment pronounced by Vice-Chancellor Wood (a) in a suit instituted for the purpose of obtaining

(a) *Stanley v. Stanley*, 2 Johnson & H. 491.

an issue of *devisavit vel non*,—the defendant's counsel launched his case by putting in certain parts of an affidavit made in that suit by one Northeast (since deceased), who had known the Tedworth property from the year 1808, and had acted as agent for it since 1828. In this affidavit, the deponent described the property at Tedworth as already stated. He further deposed that the only manor which the testatrix possessed in the county of Hants was that of South Tedworth; that it would require at least 6000*l.* a year to keep up the mansion-house and grounds at Tedworth in a suitable and proper manner; that no natural or artificial boundary had ever existed within his memory, or (as he believed) within living memory, between the parishes of Upper Tedworth and Lower Tedworth, nor between the counties of Hants and Wilts where they united at Tedworth, but that the two parishes of Upper Tedworth and Lower Tedworth had for many years past been treated in many respects as one parish; and that certain of the farms were situate partly *in the one county and partly in the other, the boundary line of [*715 the counties in some instances intersecting fields, and in others dividing cottages from their gardens.

This evidence was objected to on the part of the plaintiff as being irrelevant when once it was conceded that part of the estate was in the county of Hants: but the learned judge admitted it.

The bill in Chancery in the suit above alluded to was admitted for the purpose of showing that there was a suit in which Northeast's affidavit was taken, and who were the parties to it. The decree in that suit was tendered, and objected to on the part of the plaintiff, and withdrawn, upon a strong intimation of opinion from the learned judge that it was not admissible, though he offered to receive it if its admissibility was persisted in.

The solicitor who drew Mrs. Smith's will was also called. It was proposed by the counsel for the defendant to ask him what were the instructions which he received as to the disposition of the property. This was objected to, and the objection was allowed.

On the part of the defendant it was contended, that it was the evident intention of the testatrix to found two families, the one of whom should enjoy the Welsh estates (charged with the 40,000*l.* for the benefit of the Tedworth property), and the other the Tedworth estate, with the accretions to be purchased with the sum charged upon the Welsh property; that, from the time of the late Mr. Smith's grandfather, the whole of the property at or near Tedworth had been known as the "Tedworth estate;" that the annuities (under both wills) were charged equally upon the lands in Hants and in Wilts; that there was no division or boundary, natural or artificial, showing what part of the property was in the one county and what in the other, and that *the actual boundary of the two counties would [*716 intersect farms and fields, and separate cottages from their gardens in some instances,—a most inconvenient mode of separating the property, if such had been the intention of the testatrix; that the mansion-house and pleasure-grounds were of considerable magnitude, and would require a larger rental to keep them up in accordance with the intention of the testatrix than would be left if the Wilts property were withdrawn from the devise, even with the addition of

the 40,000*l.*; that the word "manors," in the plural, could not be satisfied without holding that the entire estate passed by the devise, there being in fact only one manor in the county of Hants, viz. the manor of South Tedworth; that the power of charging the property with jointures and provisions for younger children would be excessive if the whole estate had not been intended to pass by the devise: that there was no residence on the Wilts portion of the property; and that there was no residuary devise applicable to realty. And it was insisted that all these circumstances showed that the words "in the county of Hants" might be rejected as falsa demonstratio.

On the other hand, it was insisted on the part of the plaintiff, that there was no ambiguity in the terms of the devise, so as to render parol evidence admissible to explain it; that, as soon as the fact was ascertained that the property claimed by the plaintiff was in the county of Wilts, and that there was a property in the county of Hants, parol evidence of the boundaries of the counties and the situation of the property was irrelevant; that the inadequacy of the Hants property to keep up the mansion-house was not a circumstance of which the court could take notice; and that the words "in the county of Hants" amounted to limitatio veri, and must be taken to confine the devise to *such of the property at Tedworth as was locally
*717] situate within that county.

On the part of the plaintiff it was proved that the testatrix possessed a property, consisting of about 650 acres, called Doyley Wood, which was situate in the county of Hants, and about ten miles from Tedworth: and, to show that this was a reputed manor, it was proved that from the year 1767 to the year 1815 several deputations were granted by Mr. Smith and his ancestors to game-keepers to shoot over that property, in which deputations it was called "the manor of Doyley Wood:" and it was contended, on the authority of *Hunt v. Andrews*, 3 B. & Ald. 341 (E. C. L. R. vol. 5), that these deputations were admissible.

Their reception was objected to on the part of the defendant; but the objection was overruled by the learned judge.

There was also evidence given (by the keeper at Doyley Wood) that there was a pound on the waste land between Doyley Wood and the turnpike-road, and that cattle straying in the wood had been pounded there. It was conceded that no manor courts had been held or quit-rents received.

Evidence was given in reply, that Doyley Wood was within the ambit of the manor of Hurstborne Tarrant, and that there was no "manor" of Doyley Wood.

After some discussion as to what questions of fact should be left to the jury, and how the questions of law should be reserved for the court, the learned judge, addressing the jury, said,—“I propose to direct you, that, if you are of opinion that the property in Hants and Wilts was one property called and known as the Tedworth estate, and that it was enjoyed together as one property, and that the boundary
*718] of the estate as distinguished from the county was not *marked by any natural or artificial division, such as a fence or ditch (which there certainly was not), and that the house was largely disproportionate to the Hants part of the property plus the 40,000*l.*

which was to be raised and laid out on property to be annexed to the Tedworth estate, then you ought to find a verdict for the defendant. The construction of the will is a question of law. Subject, therefore, to the reservation of the questions of law for the opinion of the Court of Common Pleas,—to whom also may be referred the effect (if any) that is to be given to the evidence with respect to the manor (Doyley Wood),—the court to decide on the portions of evidence objected to that they may think relevant; subject to that reservation, I direct you to find for the defendant."

The jury accordingly returned a verdict for the defendant.

Montague Smith, Q. C., in Michaelmas Term last, obtained a rule to enter a verdict for the plaintiff, pursuant to the leave reserved.

Rolt, Q. C., *Coleridge*, Q. C., *Kingdon*, and *Bullar*, showed cause in Hilary Term last.—The short facts, a reference to which is necessary to make the will of the testatrix intelligible, are these:—She was possessed of two large properties, devised to her by the will of her late husband, the one in Wales, the other situate partly in Hampshire and partly in Wiltshire: the former is described throughout the will as "the Welsh estates;" the latter as "my Tedworth estate." This latter estate comprised lands in the parishes of Upper Tedworth, Lower Tedworth, and Shipton,—Upper Tedworth being in the county of Wilts, Lower Tedworth and Shipton in the county of Hants; and the whole had been known for two generations as "the Tedworth *estate." The Welsh property was worth about 46,000*l.* per annum: the Tedworth estate about 4500*l.* per annum; that [*719 portion of it which was in Hants being about 2600*l.*, and the portion which was in Wilts 1900*l.* per annum. There was nothing to mark the boundary between the several portions of the estate in the one county or the other: one large farm was partly in Hampshire and partly in Wiltshire; and in several instances the county boundary would sever cottages from their gardens. In Hampshire, where the mansion-house was, there is only one manor, viz. that of South Tedworth; for, as to Doyley Wood, which was an outlying cover of about 650 acres, the evidence failed to show that it had ever been a manor even by reputation, the depositions spoken of by one of the witnesses being a practice not unfrequently resorted to for the purpose of evading the duty on a game-certificate; and in truth it was proved that Doyley Wood formed part of the manor of Hurstborne Tarrant. The house and grounds at Tedworth were shown to be of such a character and extent as to make the Hampshire portion of the estate, even with the addition of the lands to be bought with the 40,000*l.* charged upon the Welsh estate, wholly inadequate to its maintenance in the condition which was required by the will. The evidence of all these facts, it is submitted, was admissible and essential to enable the court to see what it was that the testatrix was dealing with, and who were the objects of her bounty. The contest always is, as to the effect of the evidence when received. Thus, in *Doe d. Templeman v. Martin*, 4 B. & Ad. 771 (E. C. L. R. vol. 24), the devise was to J. T. of the testator's messuage or dwelling-house and mill, with the garden and cottage adjoining, with the mill-pond, rights, and privileges thereto belonging; and also his messuage, the

*720] Ark Cottage, garden, and *lands at Shatterwell, in * Wincanton, rented by Mrs. Sly and others*; and his messuage, dwelling-house, shop, garden, and orchard at Whitehall, in Wincanton aforesaid, rented by A. B. and others, with their respective appurtenances. The testator also devised to T. J. his orchard by the side of the river in W., near the foregoing premises, for all his (testator's) interest therein; charged, nevertheless, as to the whole of the premises, with the payment of 500*l.* to his executors in aid of and towards his residuary personal estate. In ejectment by the devisee to recover certain lands called Shatterwell Close, as part of the *lands* intended by the testator to pass by the above devise, it was proved by the defendant that the testator was entitled to the following premises at Shatterwell, in Wincanton,—the principal messuage and two closes of land rented by Mrs. Sly,—the Ark Cottage occupied by P., and the garden rented by W. L.,—the messuage, garden, and orchard called Whitehall, rented by A. B. and C. D., and Motion's Orchard, described in the will as The Little Orchard, occupied by the testator himself. These premises, with the exception of Motion's Orchard, were conveyed to the testator in 1828 by one conveyance, and were therein described to comprise a messuage, Ark Cottage, a garden, and closes, by name, formerly in the occupation of, &c., but then untenanted, and also a messuage called Whitehall, with a garden and orchard, rented by A. B. Motion's Orchard was purchased by the testator in 1827, before which time it had been united with the foregoing premises in the possession of one person. The testator in 1824 purchased other premises in Shatterwell, and at the date of his will and of his death their situation was as follows,—Shatterwell Close was rented by W. with several other closes at the rent of 170*l.* per annum. An orchard called Cold Bath Orchard was also rented by W., but under a

*721] *separate rent. A messuage adjoining was rented by the said W. L., and Lewis's Orchard was occupied by the testator himself. No part of the premises purchased in 1828 had ever been let with any part of the premises purchased in 1824, except the garden rented by W. L.; and these latter premises were separated from the former by a lane, from which there was no entrance to Shatterwell Close. It was held that all these facts were admissible in evidence, but that they raised no ambiguity as to the meaning of the devise of *the messuage, the Ark Cottage, garden, and lands at Shatterwell, in Wincanton, rented by Mrs. Sly, and others*, that being sufficiently explicit to pass all the lands of the testator situate at Shatterwell, in Wincanton, rented by any tenant. "I think," said Littledale, J., "that any evidence was admissible to show what was the state of the testator's property at the date of his will, and from whom it was purchased; but I think that that evidence, when admitted, is not sufficient to create any ambiguity as to the meaning of the will." And Parke, B., says: "It may be laid down as a general rule, that all facts, relating to the subject-matter and object of the devise, such as that it was or was not in the possession of the testator, the mode of acquiring it, the local situation, and the distribution of the property, are admissible to aid in ascertaining what is meant by the words used in the will." And that is the way in which the subject is treated by Sir J.

Wigram.(a) What are the words to be construed here? They are "I give and devise my mansion-house at Tedworth, *in the county of Hants*, and all my manors, &c. *in the county of Hants*, devised to me by the said will of my said late husband" (subject to certain annuities), "and all other hereditaments *in the said county of Hants* of or to which I shall be seised or *entitled, &c., at the time of my death [*722 (all which hereditaments in the county of Hants are herein- after described or referred to as my Tedworth estate), to the use," &c., in strict settlement. The clear intention of the testatrix was to pass the whole of her Tedworth property: and the words "in the county of Hants" must be rejected as *falsa demonstratio*. The whole scope of the will leads irresistibly to this conclusion. Her main object was to divide her property into two parts, devising her Welsh estates to her late husband's nephew George Duff, and her Tedworth property to her own nephew Francis Sloane Stanley, the present defendant. There is no residuary devise. The furniture at both places is to be dealt with as heir-looms. The Welsh estate is charged with a sum of 40,000*l.*, which is to be laid out in the purchase of lands in Hampshire and Wiltshire, which were to be "an addition to her Tedworth estate." Evidence was clearly admissible to show that the whole of the property at Tedworth was and had been for generations known as the Tedworth estate. The power of jointuring, the charges of the annuities on the whole property, and all the other surrounding circumstances, tend to the same conclusion. All the words are inconsistent with the notion that the testatrix meant to create a Hampshire family. She is professedly dealing with all that had been devised to her by her husband. In *Mirril v. Nichols*, 2 Bulstr. 176, a testator possessed, amongst other lands, of "two several moieties which he had by several purchases, the one of them lying in Essex, the other in Kent," by his will devised, as follows,— "And as to my moieties, I do devise all my moieties in Kent unto Anthony Bearblock, my son-in-law," saying nothing at all of his moiety in Essex, and having but one moiety in Kent: and it was held that these words carried both moieties to Bearblock. Coke, C. J., *says,—p. 181: [*723 "Here being moieties, in the plural number, devised, you cannot satisfy the words of this will, nor yet the meaning and intention of the devisor, with one moiety, when he by his will doth devise unto him all his moieties: if it were in a grant in such a manner, the moieties should pass; for, there is a certain demonstration of the thing to be granted, and in a grant you shall never refer one certainty upon another, and you cannot here have the plural number to be satisfied with the singular (as his moieties with one moiety), if the same was in a grant, there both the moieties should pass, and so it shall be here in this case, for the like reason, the same law, and the reason is the same here." Here, knowing that she had three manors devised to her by her late husband, the testatrix devises all her manors, &c., in the county of Hants devised to her by the will of her late husband, "all which hereditaments in the county of Hants are hereinafter described or referred to as my Tedworth estate." She had a "Tedworth estate," which was partly in Hants and partly in Wilts. Was she referring to that which was and always had been

known as her Tedworth estate? The provisions for the appropriation of the rents during minority would be sensible if applicable to an estate of considerable extent; otherwise not. So, the powers of jointuring and raising portions for younger children would be wholly disproportionate to the value of the estate if the devise were limited to the Hampshire property. Then, the provisions for sale, exchange, and partition are properly applicable only to a devise of the entire estate. The 40,000*l.* to be raised by a charge upon the Welsh estate is to be laid out in the purchase of land in Hampshire and any adjoining county, including Wiltshire. Is it probable that the testatrix intended to sever from the Tedworth estate the Wiltshire portion *724] (worth about *40,000*l.*), and leave that undisposed of, making up the deficiency by taking 40,000*l.* from the Welsh estate? Or did she intend to create a family to which the "Tedworth estate" should go in its entirety? That the latter was her intention, is plain from the provisions as to heir-looms, and the directions for keeping up the mansion and grounds at Tedworth, for which the income derived from the property in Hampshire, with the 40,000*l.* added to it, would be altogether inadequate. The muniments of title as to nearly the whole of the property in both counties were the same. The fact of the annuities being charged upon the property in both counties, the absence of a residuary devise, and the circumstance of the county boundary bisecting several of the farms and meadows, are all strongly indicative of the extreme improbability that the testatrix meant to sever the property or to die intestate as to any portion of it. [WILLIAMS, J.—If the words "in the county of Hants" may be rejected as a blunder, what are the words upon which you rely as a description of the property intended to pass?] "My mansion-house at Tedworth, and all my manors, lands, &c., devised to me by the will of my late husband,"—coupled with the fact that all the estate at Tedworth, in Wilts as well as in Hants, had been devised to the testatrix by her late husband. There can be no difficulty, therefore, in leaving out the words "in the county of Hants." [ERLE, C. J.—Generally, the words following the first description of the subject-matter of a devise have the effect of narrowing it. Annuities charged upon lands in A. and B. are charged upon each.] The whole 50*l.* to Atwell is charged upon the lands in both counties. The description in the particular devise excludes its being confined to the county of Hants. At all events, there is an ambiguity, and that is abundantly *725] explained by other parts of the will. In Sugden's Law of Real Property, p. 201, it is said: "Parol evidence is not admissible to show that a devise of lands at or of a particular place was meant by the testator to include other lands in different places. This was decided in *Doe v. Sir Arthur Chichester*, 3 Taunt. 147, 4 Dow 65. The devise was of 'my estate of Ashton,' which was held to be the same as 'my estate at Ashton.'" "But (p. 202) a property may have acquired a name, and be known to the owner by that name, and in such a case a devise of it, not by terms of locality, but by its known name, will pass portions which would not have passed if the description had been by place. The distinction is a sound one, and of course parol evidence may be given to prove that the estate was known by the name, and of what it consists. This is the case of

Doe. d. Beach v. Lord Jersey, 1 B. & Ald. 550, 3 B. & C. 870 (E. C. L. R. vol. 10), where the action of ejectment brought by Mrs. Vernon's heir at law was to recover lands in the county of Brecon. There was a special verdict, which found the will of Lord Mansel, and the marriage-settlement of his daughter, Mrs. Vernon, to which schedules of the property were annexed. Under the head of the Brecon estate a parish was named which contained the lands in question, and under the head of Glamorganshire estates was a parish called Briton Ferry. The estates in the county of Brecon, together with the manors and tenements in the county of Glamorgan, had been known by the name of the Briton Ferry estate, and by no other name, for fifty years before the death of Mrs. Vernon. The Glamorgan estates contained 30,000 acres, part of them consisting of the messuage and lands in the parish of Briton Ferry, comprising the whole of the parish; and the Brecon estates contained 4000 acres. There were six advowsons, whereof the advowson of the parish of Briton [*726
*Ferry was one, and one manor, and one-sixth of another manor, in the county of Glamorgan: there was no manor of Briton Ferry, and there was no advowson or manor in the county of Brecon. This was the substance of the special verdict: but, at the trial at nisi prius, the plaintiff tendered a bill of exceptions as to the admission of evidence on the part of the defendant, the devisee of Mrs. Vernon, whose will was made under a power in the settlement. The evidence objected to, which was received, consisted of account-books of stewards, then dead, in which they charged themselves, and in which was this entry,—‘Briton Ferry estate, in the county of Brecon;’ and of proofs that the lands sought to be recovered, together with the lands, &c., in the schedules contained, had all gone by the name of the Briton Ferry estate, and that such of the lands as were in the county of Brecon extended over twelve parishes, and contained above 4000 acres of land. This being the situation of the property, we must now turn to Mrs. Vernon's will, upon which the question arose. First, she gave and appointed, subject to the estate for life of her husband therein, ‘all that her Briton Ferry estate, with all the manors, advowsons, messuages, buildings, lands, tenements, and hereditaments thereto belonging, or of which the same consists, with the appurtenances,’ unto Lord Clarendon, for life, remainder to Lord Jersey's second son in fee, taking upon them the surname of Mansel, and endeavouring to obtain that peerage. She then gave her Penlline Castle estate, ‘which, as well as my Briton Ferry estate, is situate, lying, and being in the county of Glamorgan,’ with all the manors, &c., thereto belonging, to other persons. The case was argued upon the special verdict; and it was insisted that the second devise showed that only what was in the county of Glamorgan was to pass; and that, even without that *explanation, nothing could pass but the lands situate at the [*727
place called Briton Ferry. Lord Ellenborough observed that the description in the will was not a description by place, but by name, and comprehended all that passed under the aggregate name, and the special verdict told what that was. Holroyd, J., upon Doe d. Chichester v. Oxenden being cited, observed that the words there used were a local description, and were so considered by Gibbs, C. J., in pronouncing the opinion of the judges in the House of Lords.

Abbott, J., thought that the words in the second devise were words of affirmation, and not of restriction; for, *all* the Briton Ferry estate was devised, and the words in the latter devise, which related to a different estate, were words of suggestion. In giving judgment for the devisee, without hearing counsel on his behalf, Lord Ellenborough said there was a clear devise by name of the Briton Ferry estate, and no case had been cited to show that it was not sufficient to describe an estate by its aggregate name, and therefore he had no doubt that the whole of the Briton Ferry estate passed by this description in the will. Bayley, J., relied upon the words 'with all the manors, advowsons, &c.,' which made it clear that the devise could not be confined to that part of the estate within the parish of Briton Ferry, for there was there no manor, and only one advowson. Upon a writ of error in the House of Lords, Abbott, C. J., delivered the opinion of the ten judges who heard the argument. They were of opinion that the words 'all that my Briton Ferry estate, with the manors, &c.,' denoted a property or estate known to the testatrix by the name of her Briton Ferry estate, and not an estate locally situate in a parish or township of Briton Ferry, and consequently that a question arising upon any particular tenement was properly a question of parcel or no parcel, *728] and they therefore *thought the several matters offered to be given in evidence on the part of the defendant were admissible, and ought to have been received: they also thought that the particular description and enumeration in deeds of particulars, by situation and names, was not inconsistent with the name of the whole as composing an aggregate mass. The whole of an estate may be known by one name, and each of its parts by its own particular name. But they thought that it was not sufficiently found that the tenements and manors were so known by name by the testatrix: in truth, it was not found that they were so known by name to any person at the time of making the will: it would not be inconsistent with the finding that her knowledge should have had its commencement after the will, or should have terminated, and the name have fallen into disuse long before the making of the will, and therefore they were not able to say whether Lord Jersey's second son did or did not take any estate in the lands in question. Whereupon the Lords reversed the judgment in the King's Bench, and annulled the verdict of the jury, and directed the court to award a venire de novo. The House of Lords, therefore, did not decide the important points in this case; but there can be no doubt, if the verdict had been more explicit, that the opinions of the judges in favour of the devise passing all the estate, and of the admissibility of parol evidence to prove what was parcel of it, would have been acted upon. In a later case in the Court of Chancery,—Okeden v. Clifden, 2 Russ. 309,—Lord Eldon referred to it as a case relative to lands in Brecon, where it was found that in the accounts of what was called the Briton Ferry estate, which was mentioned as situate in a certain Welsh county, were comprised the accounts not only of the estate situated in that county, but also of *729] certain lands in an adjacent Welsh county; and the *judges, he added, were of opinion that that evidence was proper to be received, and which opinion he applied to the case before him. The principle is sufficiently clear, but the distinction is a thin one, between

a devise of 'my estate of Ashton,' and one of 'my Briton Ferry estate:' it is perhaps to be regretted that the former was considered as tantamount to a devise of 'my estate *at* Ashton,' instead of considering it, according to common parlance, as my estate called Ashton, or my estate of [that is, of the name of] Ashton." In *Miller v. Travers*, 1 M. & Scott 342 (E. C. L. R. vol. 28), 8 Bing. 244 (E. C. L. R. vol. 21), it is conceded by Tindal, C. J., that, "in all cases in which a difficulty arises in applying the words of a will to the thing which is the subject-matter of the devise, or to the person of the devisee, the difficulty or ambiguity which is introduced by the admission of extrinsic evidence may be rebutted and removed by the production of further evidence upon the same subject, calculated to explain what was the estate or subject-matter really intended to be devised, or who was the person really intended to take under the will." In *Key v. Key*, 4 De Gex, M'N. & G. 73, 84, Lord Justice Knight Bruce says: "I agree '*Certa pro incertis non reliquenda*,' but I say also '*In obscuris quod versimilius*,' and, as '*Leges non ex verbis sed ex mente intelligendas*,' so of wills. In common with all men, I must acknowledge that there are many cases upon the construction of documents, in which the spirit is strong enough to overcome the letter; cases in which it is impossible for a reasonable being, upon a careful perusal of an instrument, not to be satisfied from its contents that a literal, a strict, or an ordinary interpretation given to particular passages, would disappoint and defeat the intention with which the instrument, read as a whole, persuades and convinces him that it was framed. A man so convinced is authorized and *bound to construe the writing accordingly." "The language, as given in *Wilkinson v. Adam*, 1 Ves. & B. 466, is 'necessary implication means, not natural necessity,' but so strong a probability of intention, that an intention contrary to that which is imputed to the testator cannot be supposed.' The phrases given in *Wykham v. Wykham*, 18 Ves. 395, are 'probable necessity,' and 'an implication so probable that the mind could not resist it.'" In *Abbott v. Middleton*, 7 House of Lords Cases 68, 93, Lord St. Leonards thus lays down the general rule for the construction of wills,—“You are not at liberty to transpose, to add, to subtract, to substitute one word for another, or to take a confined expression and enlarge it, without absolute necessity. You must find an intention upon the face of the will, to authorize you to do so. When I say 'upon the face of the will,' you are, by settled rules of law, at liberty to place yourself in the same situation in which the testator himself stood. You are entitled to inquire about his family, and the position in which he was placed with regard to his property.” “If, upon the whole frame of the will, I am satisfied of what was his general intention, I start with that general intention. It will not enable me to alter words: but, having ascertained the intention, I then have to ask whether I can or cannot so construe the words actually used as to carry out the intention.” Adopting that as the rule, and looking at the general scheme of this will,—the manifest intention on the part of the testatrix to found a family on the Vaenol estate and another on the Tedworth estate,—it is impossible to arrive at any other conclusion than that the words in the devise more immediately under consideration, “in the county of Hants,” crept in by

accident. One *name* may be substituted for another in the construction of a will, where it is manifest, not only that the name used was *not intended, but that a certain other name was necessarily intended: *Dent v. Pepys*, 6 Madd. 350. So, where a county has been omitted by accident: *Earl of Newburgh v. The Countess Dowager of Newburgh*, 5 Madd. 364. *Hart v. Tulk*, 2 De Gex, M'N. & G. 300, is one of the strongest cases possible. There, the words, "the said *fourth* schedule" in the will, were held to mean "the said *fifth* schedule," upon a consideration of all the provisions of the will and of the state of the testator's property and family when the will was made, although the actual words involved no contradiction nor repugnancy to the other provisions of the will, except by making in one instance insufficient provision for the charges thereby created, having regard to the value of the property, and except by making capricious and improbable dispositions, at variance with what appeared to be the general intention. That case is always mentioned with approbation.^(a) [WILLIAMS, J.—The Vice-Chancellor seems to have treated that as a case of *falsa demonstratio*. But I do not think it is usually so read.] In *Doe d. Gore v. Langton*, 2 B. & Ad. 680 (E. C. L. R. vol. 22), the words "thereunto belonging" were rejected, in order to give effect to the manifest intention of the testator. The case of *Mosley v. Mosley*, 8 East 149, is a strong instance of the application of Lord Bacon's 24th and 25th maxims,—"*Presentia corporis tollit errorem nominis, et veritas nominis tollit errorem demonstrationis*," and "*Ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur*." There, A., having an estate in the county of Monmouth, of which he was seised *in fee in possession*, and another estate in the county of Radnor, of which he was also seised *in fee*, subject to the uses of his marriage settlement *732] (by which he covenanted to convey to the use of himself *and his wife for life, remainder to his first and other sons in tail), which left him in equity a disposing power over the reversion only; both which estates had formerly belonged to an uncle, and came to him, the one by descent, the other by purchase from another co-heir of his uncle; by his will,—misreciting the estate of which he was seised *in fee in possession* to be in the county of Radnor instead of Monmouth, and misreciting his disposable reversion to be in the county of Monmouth instead of Radnor,—devised *his estate* so misdescribed to be in Radnor, which was in truth the reversionary estate to his wife for life, remainder to his only son for life, remainder to his sons and daughters in tail, in strict settlement, remainder to his own daughter, &c.; and devised the reversion only of *his estate* so misdescribed to be in Monmouth, of which in truth he was seised *in fee absolute*, after the deaths of his wife and only son without issue, to his daughter, &c. And it was held that enough appeared on the face of the will, which also described these estates as *formerly belonging to his uncle*, to show that the deviser's intent was, to pass the present interests of his estate *in fee absolute*, which was in the county of Monmouth, and the reversion of his settled estate in the county of Radnor, although he had respectively misdescribed their local situations. [ERLE, C. J.—There, the court, comparing the devising clause

(a) See 1 Jarman on Wills, 2d edit. 421.

with the recital and the facts stated in the case, thought that sufficient appeared to ascertain beyond the possibility of a doubt what estates the testator intended to limit, independent of their local description. Here, we are called upon, not to transpose, but to reject part of the description.] Amongst other cases which Lord Bacon puts by way of illustration of the 24th maxim above referred to, are these,—“If I grant my close called Dale, in the parish of Hurst, in the county of Southampton, and *the parish likewise extendeth into the county of Berkshire, [*733 and the whole close of Dale lieth in the county of Berkshire, yet, because the parcel is specially named, the falsity of the addition hurteth not; and yet this addition did sound in name; but, as was said, it was less worthy than a proper name. So, if I grant tenementum meum, or omnia tenementa mea (for, the universal and indefinite to this purpose are all one) in parochia Sancti Butolphi-extra-Aldgate, where the verity is extra Bishopsgate, in tenura Guilielmi, which is true; yet this grant is void, because that which sounds in denomination is false, which is the more worthy, and that which sounds in addition is true, which is the less; and, though in tenura Guilielmi, which is true, had been first placed, yet it had been all one.” When there is a constat de corpore, you may reject as falsa demonstratio words which conflict with the true description. In Jarman on Wills, Vol. I. p. 449 (3d edit.), it is said: “It is clear that words and passages in a will which are irreconcilable with the general context may be rejected, whatever may be the local position which they happen to occupy; for, the rule which gives effect to the posterior of several inconsistent clauses must not be so applied as in any degree to clash or interfere with the doctrine which teaches us to look for the intention of a testator in the general tenor of the instrument, and to sacrifice to the scheme of disposition so disclosed any incongruous words and phrases which have found a place therein.” Again, speaking of the rule Falsa demonstratio non nocet, the learned author says (p. 745, 6): “In the application, however, of the principle contained in this rule, the courts have not confined themselves to cases which are strictly within its terms. It is often found, on a disclosure of the facts of the case, that of two particulars of which the description is composed, *though each, separately considered, finds some cor- [*734 responding subject, yet the one is applicable to a larger portion of the testator’s property than the other, thereby raising the question whether the more limited term be restrictive of the other, or expressive only of a suggestion or affirmation. The question is one more of construction than of law; for, it is clear, that, if the answer be that the more limited term is merely suggestive or affirmative, it will be disregarded in deciding upon the quantity to be considered as covered by the description. Now, if the testator describe the subject of the devise as an entire subject, and in terms of sufficient certainty, as, his *farm* called A., or his *house* in a particular place, or his B. estate, or the like, then, although he adds a clause to the effect that the farm, house, or estate is in the occupation of a particular tenant, or is situate in a particular county, and it turns out that such clause is true only of a part of the farm, or house, or estate, the entire subject may well pass, unrestricted by the additional clause, if such a construction be in accordance with the general intent

giving certain specific and pecuniary legacies, as to "all the residue of her *estate and effects* wheresoever and whatsoever," gave and bequeathed the same to the trustees, in trust for her sons,—declaring that the shares of her said sons should be held upon such trusts and with and under such powers and restrictions as were before declared with respect to a sum given to her son John, which trusts were applicable only to personality. And it was held that the lands in Little Bealings and Playford did not pass to the trustees either under the particular devise or under the bequest of the residue. [WILLIAMS, J., referred to *Lane v. Green*, 4 De Gex & Sm. 239, where a testator bequeathed 100*l.* apiece to the four sons of A. H. by a former husband: she had four children by such former husband, but one of them was a daughter; and Vice-Chancellor Knight Bruce held that the daughter took the legacy of 100*l.*] In *Abbott v. Middleton*, 7 House of Lords Cases 68, 88, Lord Cranworth says: "Every will must by law be in writing, and it is a necessary consequence of that law that the meaning must be discovered from the writing itself, aided only by such extrinsic evidence as is necessary in order to enable us to understand the words which the testator has used." In *Doe d. Templeman v. Martin*, 4 *739] *B. & Ad. 771 (E. C. L. R. vol. 24), where, amongst other arguments to induce the court to put an unnatural construction upon the words in the will "lands at Shatterwell," it was urged that there would otherwise be a considerable deficiency for the payment of debts and legacies charged under the will, Parke, B., says: "The testator goes on to describe the lands he intended to pass as lands rented by Mrs. Sly and others. The lands in question were rented by others: therefore, in ordinary construction, they would pass by the words of the clause. Then, what is there to oblige us to put a different construction on the word 'lands' in this case? It is said that from the context we ought to do so; and that the testator could not mean all his lands in Shatterwell to pass, because he afterwards makes a specific devise to the same devisee of his lands at Whitehall, which is in Shatterwell: but it is probable that the testator may have used the word Whitehall as the designation of a district. At all events, the wording of the clause is not sufficient to alter the meaning of the word 'lands' in the former one. Nor is there anything in the extrinsic circumstances here to lead us to put a different construction on the word: to warrant such a construction, it must appear, that, without it, there would be some absurdity or incongruity, or the words would be insensible: but there is nothing of that kind here to oblige the court to understand by the words *lands at Shatterwell* something different from their natural meaning." In *Grey v. Pearson*, 6 House of Lords Cases 61, 105, Lord Wensleydale lays down a safe and convenient rule of construction. "I have," he says, "been long and deeply impressed with the wisdom of the rule now, I believe, universally adopted, at least in the courts of law in Westminster Hall, that, in construing wills, and indeed statutes and all *740] written instruments, the grammatical *and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument; in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and incongruity,

but no further. This is laid down by Mr. Justice Burton in a very excellent opinion, which is to be found in the case of *Warburton v. Loveland d. Ivie*, 1 Hudson & Brooke 648." Adopting this test, what are the facts upon which the defendant relies? The main reliance is on the amount of the charges as compared with the value of the property which would pass according to the plaintiff's construction. It is said, that, in a possible event, if the defendant's construction be adopted, the tenant for life would only have some 600*l.* a year. But the event of all the charges falling upon the property together is extremely unlikely: and it is far more probable that the income arising from the Hampshire property and the proceeds of the 40,000*l.* charged upon the Welsh property would never be below 3500*l.* But the court will not be influenced in their construction of the will by any question of value. In *Nightingall v. Smith*, 1 Exch. 879, in order to show that certain lands passed under a devise, subject to certain charges, it was proved that the charges amounted to 2491*l.*, and that the value of the property exclusive of those lands was only 1300*l.*: but the Court of Exchequer refused to take that circumstance into their consideration in construing the will. "We do not," said Parke, B., "rely on the circumstance that the charges would exceed the value of the lands, if the dwelling-house, outbuildings, and garden, and the land purchased in 1836, alone passed by the devise, because they afford a very uncertain criterion of the testator's intention, as distinguished from the meaning of the words used; *for, his notion of value may be different from that of others, [*741 from his own peculiar knowledge or temperament. We proceed, therefore, to construe the words of the bequest independently of the last-mentioned circumstance, and ascertain their meaning, applying to them the ordinary and well-established canons of construction." Reliance was also placed upon the fact that two of the farms consist of lands in both counties. No insuperable inconvenience, however, can result from their separation: the rent may easily be apportioned. The severance of a cottage or two from their adjoining gardens is equally of small importance. This argument of inconvenience has never prevailed against clear words of the will. In *Doe d. Tyrrell v. Lyford*, 4 M. & Selw. 550, T. T. was seised of a messuage and lands in a parish and in two hamlets of the same parish which he purchased of L. and let to a tenant at one entire rent, and afterwards other lands were allotted to him under an enclosure act, in lieu of the said lands except the messuage and two acres, which remained as before,—all which the tenant continued to hold at the same rent as before; and afterwards T. T. devised all his messuage, farm, and lands, &c., situate in one of the two hamlets by name, in the said parish, which he purchased of L.: and it was held, that the lands in the other hamlet did not pass, and that evidence dehors the will to show that he intended to pass all the lands which he purchased of L., was not admissible. Lord Ellenborough said: "When the argument first commenced, I was inclined to adopt as large a construction as possible, in order to prevent the estate from being severed. But here the will is fully operative to pass the lands at Sutton Wick, and there is nothing in the description of them from which any ambiguity is raised as to the property; for, if you look to the words

*742] 'which he purchased of *Lovibond,' the devisor had lands answering that description, and also the other description, if you look to the words 'situate at Sutton Wick.' So that there is not any occasion to refer to extrinsic evidence in order to give this will effect. If there is no latent ambiguity, I cannot see any necessity to look beyond the terms of the will in order to give it a wider range. *The argument of inconvenience arising from the separation of the estate would lead into much too wide a field.* This is a devise of his lands at Sutton Wick, and at Sutton Wick only, which were purchased of Lovibond, not of all his lands which were purchased of Lovibond, but of all at Sutton Wick which were purchased of Lovibond." So here, this is a devise of all the testatrix's manors, lands, &c., in the county of Hants, and in the county of Hants only, which were devised to her by the will of her late husband,—not of all the lands which were so devised to her, but of all in the county of Hants which were devised to her by the will of her late husband. The testatrix had in her mind the description of the property in her husband's will; she carefully avoids that description when she creates the new estate of Tedworth. The pleasure-grounds attached to the mansion-house, it is to be observed, are all in the county of Hants. The 40,000*l.* may have been given in order to compensate for taking away the Wilts portion of the property. In *Doe d. Harris v. Greathed*, 8 East 91, the same learned judge considered evidence of a similar kind to be irrelevant. *Doe d. Hubbard v. Hubbard*, 15 Q. B. 227 (E. C. L. R. vol. 69), is a strong authority to the same effect. In *Knotsford v. Gardiner*, 2 Atk. 450, the testator seised of several freehold lands, and possessed of several leaseholds, devised to his wife for life all his estate in London, and, after her death, he bequeathed the afore-mentioned estates to his daughter A. C. and her heirs, and to his wife gave all his

*743] *goods, cattels, and chattels. It was urged in argument that the property consisted but of one farm, and freehold and leasehold lands were blended together in the hands of one tenant, so that they were not distinguishable, and that "it never could be imagined that the testator meant to mangle and tear the estate to pieces, in order to give it away from his own child:" but Lord Hardwicke said,—“If there should be only leasehold estates in the parish, and the testator devises all his *estates* to A., there is no doubt but the leasehold will pass under this devise. But, if there should be both freehold and leasehold, then it will be a considerable question whether any more than the freehold passed; for, in the case of *Rose v. Bartlett*, Cro. Car. 293, it was resolved, that, if a man hath lands in fee, and lands for years, and deviseth all his lands and tenements, the fee simple lands pass only, and not the lease for years. And, if a man hath a lease for years, and no fee simple, and deviseth all his lands and tenements, the lease for years passeth, for otherwise the will would be merely void. *Though in the present case I have no doubt at all as to the intention of the testator, yet the rule of the law would prevail.* In *Stone v. Greening*, 13 Simons 390, the testator devised all his real estates to trustees,—as to his *freehold* messuage, farm, lands, and hereditaments in the county of B., in trust for C. The testator had a farm in that county consisting of a messuage and 116 acres of land, of which the messuage and the greater part of the land were freehold,

and the other parts leasehold for long terms of years at pepper-corn rents; and they were interspersed with and undistinguishable from the freehold part, and had been demised therewith as one farm, at one entire rent, and the testator had always treated and dealt with them as freehold: it was held, nevertheless, that the leasehold parts were not *comprised in the trust. In *Hall v. Fisher*, 1 Coll. C. C. [*744 47, the devise was of "all that *freehold* farm called the Wick Farm, containing 200 acres or thereabouts, occupied by W. E. as tenant to me, with the appurtenances," to uses applicable to freehold property only: at the date of the will and of the death of the testator, W. E. held, under a lease from the testator, 202 acres of land which were described in the lease as the Wick Farm: of these 12 acres were leasehold: and these twelve acres were held not to pass by the devise. "I am unable," said Vice-Chancellor Knight Bruce, "to view this as a case of what is called *falsa demonstratio*. The word 'freehold,' as used in this will, seems to me a necessary part of the description, which cannot be rejected. If it had been omitted, the probability is that the leasehold in question would have been held to pass. Again, if the whole of the farm had been leasehold, the mention of the word 'freehold' would probably not have been material. But there is a subject here which properly answers the description given in the will. There is a freehold farm called Wick which contains 200 acres or thereabouts (incorrectness, if there be any incorrectness in that respect, is immaterial), and which is occupied by Eeley. Being of opinion that the freehold part of the farm is properly described by those words in the will, although the leasehold should be abstracted from it, I am obliged to say that not any leasehold land, although used and treated as freehold, can pass under this devise. I regret to be obliged to come to this decision, inasmuch as I think it likely that the testator intended otherwise, but did not sufficiently, or did not accurately, inform his solicitor of the circumstances of the property." The argument derived from the use of the word "manors," in the plural, is susceptible of two answers. The court will treat these, as was said in *Goodyer v. The Bishop of Winchester*, 2 Sir W. Bl. 930, as "general words thrown [*745 in by the drawer of the will." In *Doe d. Parkin v. Parkin*, 5 Taunt. 321 (E. C. L. R. vol. 1), the devise was of "all my messuages, &c., in T., and now in my own occupation:" the testator had two messuages in T., of which he occupied only one; and it was held that only one passed by the devise. Further, there was evidence of Doyley Wood being a reputed manor. Several depositions of game-keepers by the ancestors of Mr. Assheton Smith from 1785 down to 1815 were proved, assuming to be lords of the manor of Doyley Wood. It was not necessary to show that it was a legal manor, it was enough that it was treated as such.

2. Upon the whole, it is submitted that the effect of the evidence falls very far short of satisfying the court that there was *any* mistake. But, even if it could be shown that there was some mistake, the defendant must go further, and show that there are words in the will capable of passing the lands in Wilts. The main question is, whether, applying to this will the recognised canons of construction, the court can hold that there are words enough to pass the lands in Wilts. The

canon applicable here is the well-settled one laid down in Jarman on Wills, Vol. 2, p. 751, that, "where a given subject is devised, and there are found two species of property, the one technically and precisely corresponding to the description in the devise, and the other not so completely answering thereto, the latter will be excluded; though, had there been no other property on which the devise could have operated, it might have been held to comprise the less appropriate subject." Here, the testatrix had property which corresponded in every particular with the description in the will. In *Doe d. Tyrrell v. Lyford*, 4 M. & Selw. 550, which is a leading case upon this subject, *746] the concurrence of four points was relied on by the *defendant to show that the land in Sutton Courtney as well as that in Sutton Wick passed by the devise,—1. that the whole farm was let at one entire rent,—2. that the testator had no other real estate,—3. that there was a residuary bequest of personalty, and none of realty,—4. that the lands had been purchased with others from Lovibond: but the court held these circumstances not sufficient to control the plain words of the will. "In devises," says Bayley, J., "the rule of construction is, to make use of all the words, and not of part, and therefore where a testator dies seised of property which exactly corresponds with every part of the description given in the devise, we are not at liberty to resort to extrinsic evidence in order to show that he intended to pass other property which answers that description only in part." *Doe d. Harris v. Greathed*, 8 East 91, is also a strong authority for the plaintiff. The devise there was, of the testator's "manor of Hampreston in the county of Dorset,"—the manor really lying partly in Dorset and partly in Hants,—“and all and singular other his manors, lands, farms, &c., situate, lying, and being in or near Uddens or elsewhere in the said county of Dorset.” Later in the will, and in a codicil, the testator spoke of the premises as his "Dorsetshire estate." The mansion-house was at Uddens, in Dorsetshire. The testator had purchased from time to time land in Hants, which had been occupied with and laid to farms in Dorsetshire. The lands in Hants lay entirely surrounded by lands in Dorset, so as to be in common parlance "Dorsetshire estate:" and several farms were let to different tenants, all of which would be severed by holding that the devise passed only the lands in Dorset: and the testator had by a codicil disinherited the heir at law. The court, notwithstanding, held that the lands in Hants did not pass. Lord *747] Ellenborough says: "In putting upon the will the construction we have done, we guide ourselves by the rules we find laid down for the interpretation of written instruments. In *Plowden* 191, this rule is laid down,—‘There is a diversity where a certainty is added to a thing which is uncertain, and where to a thing certain: for, if I release all my right in *all my lands* in *Dale* which I have by descent on the part of my father, and I have lands by descent on the part of my mother, but no lands by descent on the part of my father, there the release is void.’ ‘But, if the release had been in *White-Acre* in *Dale*, which I have by descent on the part of my father, and I had it not by descent on the part of my father, but otherwise, yet the release is good;’ ‘for, *the thing was certainly expressed by the first words*, in which case, *the addition of another certainty is not necessary*,

but superfluous. Now, in the question before us, in the latter part of the devise there is no special description or name of the lands devised, so as to make the addition of something to ascertain the lands not necessary, but superfluous: and, if they may have that effect, they ought not to be rejected. And, even in cases where you give a thing a proper name, Lord Bacon says, in his 13th maxim, that 'the falsity of addition or demonstration doth not hurt; yet, nevertheless, if it stand *doubtful* upon the words whether they import a false reference and demonstration, or whether they be words of restraint that limit the generality of the former name, the law will not intend error or falsehood.' As to the argument founded on the circumstance of the lands in question being in parts of Hampshire lying within the general boundary of Dorset, the answer given by the counsel for the plaintiff, we think, is a good one, namely, that, where lands are spoken of as lying in a county, it is meant that they are a *part* of that *county." Doe d. Ashforth v. Bower, 3 B. & Ad. 453 (E. C. [*748 L. R. vol. 23), is also strongly in point. There the devise was of "all my messuages at, in, or near a street called Snig Hill, in Sheffield, which I lately purchased of the Duke of Norfolk's trustees." The testator had four houses in Sheffield, about twenty yards from Snig Hill, and two houses about four hundred yards from it, in a place called Gibraltar Street, also in the town of Sheffield. He purchased all the houses by one conveyance, and redeemed the land-tax upon all by one contract: and there were other circumstances making it probable that they were considered as *one* in the devise. He had no other houses in Sheffield. It was held that the terms "at, in, or near Snig Hill," did not apply to the houses in Gibraltar Street; and that, there being four houses which answered all the terms of the devise, it must be understood as meant to pass these, and not the two to which only part of the description applied. It was argued, that, if the words had been only "which I lately purchased of the Duke of Norfolk's trustees," there could have been no doubt; and that "at, in, or near Snig Hill," could not control it. Littledale, J., there says: "The first part of the description, 'my messuages situate at, in, or near Snig Hill,' applies to the four houses, and not to those now claimed. The further words, 'which I purchased of the Duke of Norfolk, or his trustees,' are merely additional description, and do not extend the effect of what precedes. Houses at or near Snig Hill would have passed by the former part of the clause, although some of them had not been bought of the Duke or his trustees, according to the rule, that, where there is sufficient certainty in a description, a false reference added shall not destroy its effect." And Parke, J., says: "One rule of construction is, that an heir at law shall not be disinherited except by express words. And another, as stated by *Lord Bacon, is, that, if there be some land wherein all the [*749 demonstrations in a grant are true, and some wherein part are true and part false, the words of such grant shall be intended words of true limitation to pass only those lands wherein all the circumstances are true. Here, all the circumstances are true of the four houses, but not so of the two. These last are not 'at, in, or near Snig Hill,' and they are in a place bearing a different name. And, if the testator had intended by the devise in question to pass all these

houses, why should he not have described them as all his houses in Sheffield (for, he had no others)? or all the houses which he bought of the Duke's trustees?" What Littledale, J., says has relation to cases where the reference to the locality or occupation *precedes* the name. To the same effect is the passage in 1 Jarman on Wills 748,—“Though a devise of ‘my farm called A., in the occupation of B.’ is not limited to that part of the farm which is in the occupation of B., yet perhaps it does not follow that the same construction would be given to a devise of ‘all my farm in the occupation of B., called A.’ In this case the reference to the occupancy forms the primary substantive part of the description, and the name is merely an addition. Thus, in the early case of *Woodden v. Osbourn*, Cro. Eliz. 674, where A., having lands called Hayes Lands, which extended into two vills, Cokefield and Cranfield, devised all his lands in Cokefield called Hayes Lands, to J. S., it seems to have been held that the part which was in Cranfield did not pass. Unless a reference to locality be more restrictive than a reference to occupation, this case seems to warrant the distinction suggested. It is to be observed, however, that Popham, C. J., and Gawdy and Yelverton, JJ., went on to say, that, if the words had been ‘all his lands called Hayes Lands, in the parish of Cokefield’ (thus reversing the order), *nothing

*750] had passed but the land in Cokefield.(a) And, on the other hand, a distinction for this purpose between a reference to locality and a reference to occupation, is discountenanced by the case of *Doe d. Beach v. The Earl of Jersey*, 1 B. & Ald. 550, 3 B. & C. 870.” There is a plain and manifest distinction between the language of the devise here and that in *Doe d. Beach v. The Earl of Jersey*. In *Morrell v. Fisher*, 4 Exch. 591,—which is always considered as a leading case,—the testator bequeathed his freehold farm in Headington, called the Wick Farm, to certain persons in moieties. Two parcels of land which had formerly belonged to that farm had been conveyed by the then owner to the president and scholars of Magdalen College, who demised the same to the testator by way of renewed lease. The testator further devised “all my leasehold farm-house, homestead, lands, and tenements at Headington, containing about 170 acres, held under Magdalen College, Oxford, and now in the occupation of B. as tenant to me.” B. occupied a farm at Headington which was leased to the testator by Magdalen College, but he had never occupied the above two parcels of land. It was held that the description of the lands being in the possession of B. could not be rejected as a false demonstration, and consequently that the two parcels of land did not pass under the latter devise. In stating the reasons upon which the certificate was founded, Alderson, B., said: “We are of opinion that no farm-house or land passed, except that in which all the three circum-

*751] stances concurred; that *is to say, being lands in Headington, they must be leasehold of the college, and they must be in the possession of Burrows. These lands are not within the latter of these three descriptions, and therefore they do not pass by the devise.”

(a) In *Stukeley v. Butler*, Hob. 171, it is said,—“It is vain to imagine one part before another; for, though words can neither be written nor spoken at once, yet the mind of the author comprehends them at once, which gives *vitam et modum*, to the sentence.” See also *Doe d. Smith v. Galloway*, 5 B. & Ad. 43, 50 (E. C. L. R. vol. 27).

As to Doyley Wood (consisting of 600 or 700 acres of wood land), it is ten miles distant, and no part of what could in any sense be called the Tedworth estate. There is no ambiguity in the earlier words of the will: and speculation cannot be permitted to prevail against the express description of the property intended to pass.

Our adv. vult.

ERLE, C. J., now delivered the judgment of the court: (a)—

In this ejectment the plaintiff claimed lands in the county of Wilts, as heir to Mrs. Assheton Smith; and he was entitled to succeed, unless they passed to the defendant under the following devise:—"I give my mansion-house at Tedworth, in the county of Hants, and all my manors, farms, lands, tenements, and hereditaments in the county of Hants, devised to me by my late husband, subject to annuities charged thereon by his will, and subject to a further annuity charged thereon by me, and all other hereditaments in the said county of Hants to which I am or shall be entitled at my death; all which hereditaments in the county of Hants are hereafter described or referred to as 'my Tedworth estate.'"

The construction of the will is for the court; and the application of the words of the will to the person or thing described is part of the operative construction. For the purpose of such construction, the court must *be informed of the circumstances sur- [*752 rounding the testatrix when she was making her will,—such as her family status, and the nature of her property. These facts extrinsic to the will must be ascertained for the court in the usual manner, either by admission of the parties, or by a jury. When they have been ascertained, the operation of construction is to be performed by the court. The purpose of construction is, to effectuate the intention of the testator expressed in the words of the will. Questions of construction are raised in relation either to the person or the property or the estate intended. Here, the question relates solely to property, viz. what property was the subject of the devise above mentioned. The application of the words of the will to the property proved to exist, is made by inquiring whether all the facts of the description can be truly predicated of any of the testator's property in respect of which either all or some or none of the facts of description are true.

As to the case where there is property in respect of which all the facts of the description are found to be true, so that the property exactly fits the description, the whole of that property, and nothing more, passes. As to the case where there is property in respect of which none of the facts of description are true, no property passes. Where the inquiry results in the third alternative, viz. where there is property in respect of which some of the facts of description are true and some not, there the court must inquire whether the part of the description which applies to the property is a complete definition of a subject of devise, so that the misdescribing part may be justly regarded as a mistake, and rejected as a false demonstration, in order to prevent a total failure of the devise.

If this latter inquiry results in an affirmative answer, the property

(a) The judges present at the argument were, Erle, C. J., Williams, J., Willes, J., and Keating, J.

*753] which is so found to be completely *defined passes, notwithstanding a partial failure of the applicability of the whole of the description. It is in the case of this third alternative that the doctrine relating to the rejection of false demonstration is brought into use: but it never can be properly applied where there is a property which every part of the description fits, and on which every word thereof has full effect.

We find the current of decisions to be in conformity with these principles. We refer generally to those cited by the counsel for the plaintiff, which appeared to us to support their argument. We mention those that follow with more detail, to exemplify the strictness with which the courts, in construing and applying the description of the subject of devise, have confined their consideration solely to the intention to be collected from the words of the will, and have uniformly rejected the consideration of any intention at variance therewith, which may be supposed to be inferred from the extrinsic facts.

We do this with the most sincere deference to the judgment of Wood, V. C., in this case, in which greater effect appears to us to be given to the extrinsic facts than we have felt authorized to allow to them.

As to the first alternative, where property is found which exactly fits the description in the will, authorities are not wanted to prove that such property would pass: but we refer to *Doe d. Templeman v. Martin*, 4 B. & Ad. 771 (E. C. L. R. vol. 24), for the purpose of showing that words of description pass all that is within their meaning, though those words would have some operation if the devise was limited to a smaller property, and the intention that such smaller property only should pass might well be inferred from extrinsic evidence. The description was, "my messuage the Ash cottage, gardens, and lands, at Shatterwell, rented by S. and others." There was *754] a particular property *which the description exactly fitted, so that each word operated; and there was also a larger farm in Shatterwell, rented by another person. The court rejected evidence of intention from circumstances, and decided that the words of description should have full operation to pass all that was within their meaning; and the farm so rented passed as land in Shatterwell, rented by others.

But, under the first alternative, viz. where property is found which exactly fits the description in the will, some examples may be usefully added, in order to show that nothing more passes than the property which so fits the description; this being the principle which has a close relevancy on the present occasion. Where the fact of description is local situation, the property so locally situated passes, and no more. Thus, a devise of "my estate of Ashton,"—which was held (as some have thought, without just cause) to be tantamount to a devise of "my estate at Ashton;" see Lord St. Leonards on the Law of Property in the House of Lords, pp. 202–206,—was construed to be a devise of property locally situate in Ashton parish; and evidence was admissible to show that the Ashton estate extending into several parishes was intended to be the subject of this devise, and nothing passed except property in that parish: *Doe d. Oxenden v. Chichester*, 4 Dow 65. Where the facts were, the mode of acquisition as to one part,

and the local situation as to another part, the court limited the devise by the facts of description, and rejected all arguments from the extrinsic facts. The description was, in effect, "lands in Hampreston purchased from Lord Arundel," and "lands near Wadden, in the county of Dorset." There was property in Hampreston not purchased from Lord Arundel, lying in parts of Hants surrounded by Dorset; and this property had been laid to and was occupied with lands and farms in Dorset: held, *nevertheless, that the lands in Hampreston, in Hants, not purchased from Lord Arundel, did not pass: [*755 *Doe d. Harris v. Greathed*, 8 East 91. The same principle governed the decision in the following cases,—*Doe d. Browne v. Greening*, 3 M. & Selw. 171, *Doe d. Tyrell v. Lyford*, 4 M. & Selw. 550, *Evans v. Angel*, 26 Beavan 202, *Doe d. Renow v. Ashley*, 10 Q. B. 663 (E. C. L. R. vol. 59). And the principle was clearly explained and applied in *Morrell v. Fisher*, 4 Exch. 591, where the court says: "There are two rules, '*Falsa demonstratio non nocet*,' and '*Non accipi debent verba in demonstrationem falsam quæ competunt in limitationem veram*.' The first rule means, that, if there be an adequate and convenient description with convenient certainty of what was meant to pass, a subsequent erroneous addition will not vitiate it. The characteristic of cases within the rule, is, that the description, so far as it is false, applies to no subject at all, and, so far as it is true, applies to one only. The other rule means, that, if it stand doubtful upon the words whether they import a false reference or demonstration, or whether they be words of restraint that limit the generality of the former words, the law will never intend error or falsehood. If, therefore, there is some land wherein all the demonstrations are true, and some wherein part are true and part false, they shall be intended words of true limitation, to pass only those lands wherein the circumstances are true."

As to cases falling within the third alternative above mentioned, viz. where there is property in respect of which some of the facts of description are true and some not, it is superfluous to add them, because the present case does not in our judgment fall within the class: but, for the purpose of exemplifying the principle, we refer to two cases,—*Goodtitle d. Radford v. Southern*, 1 M. & Selw. 299, where a devise of Trogue's *Farm, now in the occupation of D., was held to pass two closes, parcel of Trogue's Farm, although not [*756 in the occupation of D., because Trogue's Farm was the name of a specific property, including the two closes in question,—and *Doe d. Beach v. Lord Jersey*, 1 B. & Ald. 550, where a devise of the Britton Ferry estate and all the manors and hereditaments thereunto belonging, with the additional fact of description in a subsequent part of the will, that it was situate in the county of Glamorgan, was held to pass the whole of Britton Ferry estate situate both in Glamorgan and Brecon, and not to be limited to Glamorgan by the additional description, that being construed to be a false demonstration added to a description already clearly defined.

We have cited cases exemplifying the general principles governing this decision. We do not discuss at length the cases of *Newburgh v. Newburgh*, 5 Madd. 364, or *Hart v. Tulk*, 2 De Gex, M'N. & G. 300, on which stress has been laid in some of the stages of this litigation,

because the decision in each turns on provisions peculiar to the wills there in question, to which provisions there is nothing analogous in the will of this testatrix. In each of those cases the court found in the will the intention expressed which was enforced by the decision. Here, we can find in the words of the will, construed and applied according to the circumstances of the testatrix, no intention expressed of giving property situate out of the county of Hants.

These being the principles of law, we come to the facts ascertained at the trial, viz. that there was and long had been one property called and known as the Tedworth Estate, partly in Hants and partly in Wilts, enjoyed all together as one property, without any boundary or division line marked by any natural or artificial division, such as stream, ditch, or the like; and that the house was largely disproportionate to the *Hants part of the property, increased by the *757] legacy of 40,000*l*. Upon these facts, the verdict was entered below for the defendant, subject to a rule for entering it for the plaintiff, the heir at law, if this court should be of opinion, that, under the devise above mentioned, the property in Wilts did not pass to the defendant, the devisee. That rule is now to be disposed of: and our judgment is, that it should be made absolute.

We think that the description limiting the lands devised to the county of Hants must operate as a true limitation, and cannot be rejected as a false demonstration, and that lands in Wilts are excluded from the devise, the words of the gift confining it to such lands as are locally situate in the county of Hants. The words are clear, and are capable of full effect, and are not repugnant to any part of the will. The description of "all the hereditaments in the county of Hants that passed by the will of my late husband, subject to certain annuities," exactly fits Lower Tedworth, and nothing more: and we must make the construction that Lower Tedworth and nothing more passes thereby. The description of "all other hereditaments in the county of Hants over which I have a disposing power," exactly fits Doyley Wood and any after-acquired property in Hants, if such there had been: but there was none; Doyley Wood, therefore, passes, and nothing more. The testatrix having thus given, according to our construction, Lower Tedworth and Doyley Wood, and any other property in Hants, if such should be found, introduces the phrase "my Tedworth estate," and defines the meaning thereof to be "those hereditaments in the county of Hants which she had thus devised," that is, Lower Tedworth and Doyley Wood. Throughout the will, the words persistently express an intention to limit the devise to the county of *758] Hants. The phrase "my Tedworth estate," if no *definition had been added, would have designated by name the well-known property lying in Hants and Wilts, to which the verdict of the jury relates; and the part of the description, "in the county of Hants," might have been rejected as a false demonstration, according to the cases above mentioned; but the phrase "my Tedworth estate" is never used without referring to the definition confining it to property in the county of Hants, and thereby excluding the construction that the larger property in the two counties was intended to pass.

In the part of the will which precedes the devise now in question, "my Tedworth estate" is accompanied with a reference forwards to

the definition by the words "hereinafter devised." In the part of the will which follows the devise here in question, "my Tedworth estate" is always accompanied with a reference back to the definition by the words "my *said* Tedworth estate." Where the devise is to operate upon lands not in Hants, as in the bequest of the annuity of 50*l.* to Atwell, the name "my *said* Tedworth estate" is dropped, and the name used in her husband's will, which had the effect of charging the lands in Upper Tedworth, in Wilts, as well as the lands in Lower Tedworth, in Hants, viz. "all my hereditaments at or near Tedworth," is adopted; and this change of name, as far as words alone are concerned, indicates that the testatrix was aware of the effect of the limitation to the county of Hants; and, when her intention was that the limitation to that county should not apply, the name was changed.

By this construction, we conceive that effect is given to every word of the description in the devise, and that the property passes which exactly fits that description, and nothing more.

We notice that "manors," in the plural, are given; *and [*759 there was evidence of only one real manor in the county of Hants: but the gift of "all my manors, lands, tenements, and hereditaments, in the county of Hants," is a gift of all property coming within those general terms, if such there should be; and is not analogous to a gift of specific property by an appropriate name: and we think that the argument derived from the mention of "manors," in the plural number, is not sufficient to countervail the arguments on which the plaintiff relies.

For the defendant, it has been argued that the property in Wilts passed under the devise to him. But the argument, when closely analyzed, appears to us to assume for its basis that the probable intention to give lands in Wilts, to be collected from extrinsic facts, ought to prevail over the intention to limit the devise to lands in Hants, expressed by the words of the will; and that, in order to give effect to the intention so collected from the extrinsic facts, the will ought to be construed as if the words were altered, either by rejecting some, or adding others.

If the inquiries were legitimate, we might find good reason in the extrinsic facts for concluding that the testatrix intended to give that which the jury have found to have been long known by the name of the Tedworth estate, as that property would have been more suitable to the mansion, and more consistent with a supposed plan of establishing a family seat, with furniture as an heir-loom; and in that form would have been free, not only from the minor inconvenience of dividing single holdings into separate properties by the line of the county boundary, but also from the great sacrifice of enjoyment consequent upon the severance of such a property. But it was admitted that, in construing a will, alteration of the words cannot be allowed for the purpose of effecting an *intention collected only from [*760 the extrinsic facts, and opposed to the words as they stand. It follows that we cannot by construction read this devise as if it had been of "the Tedworth estate," without the definition limiting it to the county of Hants, or as if it had been a devise of "lands at or near Tedworth," or of "lands in Hants and Wilts:" and, unless the will cau

be read as if it was so altered, the claim of the devisee seems to us to fail.

If the defendant could have shown, that, in applying the description to the property, one part of the description was repugnant to another part, so that it was impossible to give effect to both parts, and there was a property clearly defined by one part of the description, effect might be given to that part, and the other part, which could not possibly be applied, might be rejected, being a case of false demonstration, as above explained. But, as we have above stated, all the words are clear, and capable of being applied in full operation to the property found to exist; and there is no repugnance. It follows that there is no false demonstration; and the intention inferred from the extrinsic facts cannot prevail against the intention expressed by the words of the will.

A further argument against the construction which we have adopted was found in the fact that the testatrix would thereby be made to die intestate so far as regards the property in Wilts: and the fact is so: but the answer is, that we do not find any declaration of an intention that the whole of the property should pass by the will, nor of any intention that the heir at law should be entirely disinherited. Indeed, as there is a residuary clause relating to personal property, and no residuary clause relating to real property, the will does not afford any inference against an intention to leave some property undisposed of thereby.

*761] *There was also some argument founded upon the amount of payments which might become charged on the property in Lower Tedworth, so that only a small income might remain for the occupier. But the inadequacy of the estate to the charges was not clear, the contingencies of many charges existing was distant, and there was possibility that the tenant of the particular estate might have other sources of income. The argument founded on the relation of the possible charges to the value of the land devised, was not allowed to have weight in *Doe d. Templeman v. Martin*, above cited.

For these reasons, we are of opinion that the property here in question did not pass under the devise. It follows that the plaintiff, as heir at law, is entitled thereto, and therefore the rule for entering the verdict for him must be made absolute. Rule absolute.(a)

(a) Notice of appeal against this decision was served: but ultimately the parties agreed to a compromise,—the heir at law to receive 25,000*l.* and a moiety of the mesne profits.

KINGSFORD v. THE GREAT WESTERN RAILWAY COMPANY. *June 13.*

A railway company may have discovery of documents under the 50th section of the Common Law Procedure Act, 1854, *upon the affidavit of their attorney*,—it being impossible for them literally to comply with the terms of that provision, and it being the intention of the legislature that its benefit should be extended to all suitors.

Christopherson v. Lotinga, 15 C. B. N. S. 809 (E. C. L. R. vol. 109), distinguished.

THIS was an action brought by the plaintiff to recover from the defendants an alleged balance of certain iron remaining undelivered in the hands of the defendants at Wolverhampton. The declaration *contained a count for non-delivery of the iron according to [*762 promise, a count in trover, and a count in detinue.

The iron in question formed a portion of a considerable stock belonging to the Old Park Iron Company, held for them by the defendants. The delivery to the plaintiff had been withheld by reason of the Old Park Iron Company claiming it to be still theirs, on the ground that the sale thereof to one Sewell (from whom the plaintiff had purchased it) was vitiated by fraud.

On the 5th of January last, an interpleader order was made by Shee, J., whereby he ordered that the defendants do give up the 250 tons of iron, upon payment of railway charges and expenses, to the plaintiff, the iron having been first weighed and separated by the claimants, upon the plaintiff's paying 1000*l.* into court, or giving security for that amount to the satisfaction of the Master, and that thereupon the defendants be discharged from this action; and that an issue be tried between the plaintiff and the Old Park Iron Company, to try the title to the iron.

In pursuance of that order, the plaintiff gave security for 1000*l.*, and the defendants delivered to him 250 imperial tons of iron out of the stock belonging to the Old Park Iron Company. The plaintiff, however, insisted that the sale to Sewell was by "long weight," viz. the Staffordshire weight of 120*lbs.* to the cwt.; and, the claimants abandoning the interpleader order, a further order was made by Shee, J., on the 12th of April, "that the plaintiff be at liberty to proceed in this action in respect of any quantity of iron which he claims to have delivered in addition to the 250 imperial tons already delivered to him."

The plaintiff thereupon delivered particulars in the second action, claiming 17 tons, 17 cwt. 16 *lbs.* of iron, or their value.

*The plaintiff afterwards obtained an order under the 50th [*763 section of the Common Law Procedure Act, 1854, that the defendants' secretary answer on affidavit stating what documents the defendants had in their possession or power relating to the matters in dispute, &c.

The defendants then applied for a similar order, *upon an affidavit by their attorney*, to the following effect,—“I believe the plaintiff has in his custody, possession, or power, the contract under which he purchased the said iron of Sewell, and the contract under which Sewell purchased from the Old Park Iron Company. I also believe the plaintiff wrote certain letters in relation to the said purchase, and that he has kept copies of such letters. I believe that the plaintiff

has certain letters relating to the purchase and transfer of the said iron from the Old Park Iron Company, and has certain books containing entries relating to the same. I am advised and believe that the defendants are entitled to the production and inspection of such books, papers, and documents in support of their case at the trial, and that the defendants will derive material advantage and support from the production of the same."

Keating, J., before whom the summons came on, declined to make an order, but referred the matter to the court.

Montague Smith, accordingly, on a former day in this term, obtained a rule calling upon the plaintiff to show cause why he should not answer on affidavit, stating what documents he had in his possession or power relating to the matters in dispute, or what he knew as to the custody they or any of them were in, and whether he objected (and, if so, on what grounds) to the production of such as were in his possession or *power; or why the defendants' compliance with *764] the order directing them to make such discovery should not be suspended. He referred to *Christopherson v. Loting*, 15 C. B. N. S. 809 (E. C. L. R. vol. 109), and distinguished it on the ground that there the plaintiff himself might have made the affidavit, though a strict compliance with the statute would occasion some inconvenience. [BYLES, J.—If the corporation are plaintiffs, they must swear by their secretary. WILLES, J.—In *Oxlade v. The North Eastern Railway Company*, 12 C. B. N. S. 350 (E. C. L. R. vol. 104), we allowed interrogatories, under s. 51, without an affidavit of *an attorney*, the plaintiff conducting the cause in person,—on the ground that it could not have been the intention of the legislature that a party suing in person should be deprived of the benefit of interrogatories. By parity of reasoning, possibly a corporation or a lunatic may be entitled to discovery without a literal compliance with the 50th section, by reason of its being the obvious intention of the legislature that all should have the benefit of that provision. ERLE, C. J.—I think we should construe the act as nearly as may be according to the intention of the legislature, which confessedly was to give equal rights to all suitors.]

Sir George Honynman now showed cause.—The question is, how is a corporation to obtain discovery? The 50th section provides, that "upon an affidavit by either party to the cause of his belief that any document to the production of which he is entitled for the purpose of discovery or otherwise, is in the possession or power of the opposite party, it shall be lawful for the court or a judge to order that the party against whom such application is made, or, if such party is a body corporate, that some officer to be named by such body corporate, *765] shall answer on affidavit," &c. The *legislature is therefore alive to the fact that one of the parties litigant may be a corporation. Now, it may well be that some officer of the corporation knows what documents are in its possession or power: but, how can the attorney of the corporation pledge his oath as to *the belief* of the corporation? In *Christopherson v. Loting*, 15 C. B. N. S. 809 (E. C. L. R. vol. 109), the court expressly held that the application must be founded upon the affidavit of *the party to the cause*,—conceiving the words of the section to be too clear to be got over. [BYLES, J.—

There, there was great difficulty in obtaining the affidavit of the party: here it is an absolute impossibility.] The 52d section contains a proviso, that, "where it shall happen, from unavoidable circumstances, that the plaintiff or defendant cannot join in such affidavit, the court or judge may, if they or he think fit, upon affidavit of such circumstances by which the party is prevented from so joining therein, allow and order that the interrogatories may be delivered without such affidavit." There is no such power of dispensation, however, in s. 50. Under s. 51 the affidavit of *the party* is made a condition precedent, except in the case of a corporation, who may swear by their attorney. If the affidavit under s. 50 might be made by the attorney, there was no necessity for this exception of the case of the corporation in s. 52. The case, therefore, it is submitted, falls precisely within that of *Christopherson v. Lotinga*. The court will hold itself bound by the words of the section, and cannot speculate upon the intention of the legislature which is unexpressed. Then, as to the other branch of the rule, which asks that the defendants may be dispensed from compliance with the former order until the plaintiff consents to do something which he is not bound to do,—the obvious answer to that is, that the court will never do indirectly that which it has no power to do *directly. [WILLES, J.—The House of Lords did so in *The King of Spain's Case*.] In *Calliand v. Vaughan*, 1 Bos. [*766 & P. 210, the court refused, by putting off a trial, or other indirect means, to compel a party to consent to a commission for the examination of witnesses. So, in *The Attorney-General v. Bovet*, 15 M. & W. 60,—where it was held, that, in an information by the Attorney-General for penalties for a breach of the revenue-laws, the Court of Exchequer had no jurisdiction, on motion by the defendant, either at common law or by statute, to direct a commission to issue for the examination of witnesses abroad,—the court refused to stay the proceedings until the Attorney-General should consent to the issuing of such commission.

Montague Smith and *J. Clark*, in support of the rule.—This case is not governed by *Christopherson v. Lotinga*. There, it was only a question of degrees of inconvenience: here, it is impossible that the defendants should comply strictly with the terms of the section: and it is perfectly obvious from all the provisions that it was intended that all suitors (including corporations) should have equal rights of discovery and interrogation. Where a term is imposed which cannot be complied with, the court will so construe an act of parliament as to give effect to its obvious intention. It is upon this principle that Bayley, J., and Littledale, J., proceed in *Cortis v. The Kent Waterworks Company*, 7 B. & C. 314 (E. C. L. R. vol. 14). The 43 Eliz. c. 2, says Bayley, J.,—p. 330,—“gives the right of appeal to any *person* or *persons* aggrieved by any rate. It is said, however, in this case, that it must be collected from the appeal clause of this act that corporations were not intended to be included, inasmuch as the person or persons appealing against a rate are required to enter into a *recognisance, and that a corporation cannot do so. If it were necessary to decide that point, I should pause before I said that a corporation is not competent to enter into a recognisance. I am aware that there is a dictum (Moore 68) to show that they cannot do so; but, as

they may appoint an attorney for a variety of purposes, I am not satisfied that they may not do so for the purpose of entering into a recognisance. But, assuming that they cannot enter into a recognisance, yet, if they are *persons* capable of being aggrieved by and appealing against a rate, I should say that that part of the clause which gives the appeal applies to all persons capable of appealing, and that the other part of the clause, which requires a recognisance to be entered into, applies only to those persons who are capable of entering into a recognisance, but is inapplicable to those who are not." And Littledale, J., p. 337, says: "Where an act of parliament directs a thing to be done which it is impossible for a corporation to do, but which other persons may do, and another act which a corporation as well as others can do, then the corporation will be excused from doing the thing which it cannot do, and will be compelled to do the act which it is capable of doing." *Oxlade v. The North Eastern Railway Company*, 12 C. B. N. S. 350 (E. C. L. R. vol. 104), is a distinct authority in favour of this application. If there is a person who *can* make the affidavit, the statute requires him to make it: but, if the party to the cause be in such a position as to be incapable of making an affidavit, by necessary intendment it may be dispensed with. This is an equitable jurisdiction now for the first time given to the court; and the court will so deal with it as to do equal justice to all parties.

*768] ERLE, C. J.—I am of opinion that this rule should *be made absolute. This is an application under the 50th section of the Common Law Procedure Act, 1854, for a discovery on behalf of the Great Western Railway Company, who are a corporation. The plaintiff had obtained a similar order against the company: and he now meets their application with the technical objection that they cannot comply with the statute, because incapable of making an affidavit. The very obvious intention of the legislature was, in furtherance of the interests of truth and justice, to give *all* suitors the benefit of discovery, which before was peculiar to the courts of equity. They have said that either party may obtain such discovery by an application founded upon his affidavit of his belief that documents to the production of which he is entitled are in the possession or power of his adversary. The governing intention of the legislature is, that all the suitors shall have this benefit. And I am of opinion that the general intent of the legislature ought to be carried into effect, and that the special provision is sufficiently complied with by an affidavit made by the corporation in the only way in which they can make it, viz. by the person who appears as their attorney in the cause. In *Christopherson v. Lotinga*, 15 C. B. N. S. 809 (E. C. L. R. vol. 109), the order was sought upon the affidavit of the managing clerk of the plaintiff's attorney, it being sworn that the plaintiff was in Spain, where he resided and carried on business. The court refused to assent to the application, and certainly in so doing used very wide words: but the language of a judgment should always be taken with reference to the matter to be adjudicated upon. The question was, whether, the plaintiff being in Spain, the affidavit of the managing clerk to his attorney was a sufficient compliance with the requirement of the section: and the court held that it was not. The plain distinc-

tion between that case and this has *already been pointed out, viz. that there, there was a possibility of the affidavit being [*769 made by the party himself, and no power of dispensing with it; whereas, here, the making of an affidavit by the corporation is an impossibility. I observe that my Brother Willes in that case drew attention to the fact that a strict interpretation of the words of s. 50 would constrain the court to hold that, though a corporation would be bound to make discovery, they would be precluded from availing themselves of the provision for enforcing it. I adopt as the ground of my judgment the words of my learned Brother in that case,—that “the object of the statute was to assist *all* suits by *all* suitors, and to give all equal remedies and equal means of acquiring or defending their rights.” Assuming that to be the intention of the statute, and seeing that it is impossible for the defendants to comply strictly with its terms by making an affidavit themselves, I think they sufficiently comply with it by getting some one to make it for them, and that their attorney is the proper person for that purpose.

WILLIAMS, J.—I am of the same opinion. The legislature never could have contemplated such injustice as that a corporation should be subject to discovery at the instance of an individual, whilst they themselves should be precluded from having the benefit of the statute. I think that, upon the fair construction of the 50th section, where one party is a corporation, so as to be incapable of complying literally with its words, they ought to be permitted to do so substantially, by making an affidavit through a person who stands in their place.

WILLES, J.—I am of the same opinion. All that the court decided in *Christopherson v. Lotinga* is that *which has been stated by my Lord, viz. that distance and inconvenience are not ground [*770 for dispensing with the affidavit of the party which is required by the 50th section of the Common Law Procedure Act, 1854,—or, to speak more correctly, that the legislature cannot have intended to make an exception where the making of an affidavit by the party is extremely inconvenient, it being still possible. Where, however, from the nature of the case, the party cannot make an affidavit,—an oath in writing sworn by himself,—as it is intended that equal justice shall be administered to all, and a corporation *propter impotentiam* cannot make an affidavit by itself, it follows that it must be allowed to make it, where an oath is required, by some person who has the means of testifying to the fact to be deposed to. Exceptions appear to have been made in other parts of the act in respect of persons under inability, among others in respect of corporations. Whether infants are to make affidavit by their next friends, or lunatics by their committee, it is not necessary to say. But it is impossible that a corporation can ever arrive at such a state of existence as to be enabled to make an affidavit personally. A corporation is allowed to answer in Chancery by its officer.(a) In the case of *The King of Spain v. Hullett*, 1 Clark & Fin. 333, many authorities are collected in the argument, and many reasons suggested for dispensing with the personal oath of the plaintiff in his answer to a cross-bill filed against him by the defendants to the original bill. It was contended, amongst other

(a) Under their corporate seal, according to their usual mode of affixing it: see 1 Smith's Ch. Pr. 477.

things, that it was against his dignity as a sovereign prince to require him to pledge his oath. But the House of Lords held, that, as the King could in fact make oath, there was no reason why the practice *771] of the court *should be departed from. The true distinction is, between a corporation sole, who can swear, and a corporation aggregate, who cannot.

BYLES, J.—I am of the same opinion. Without some invincible necessity, we should not yield to a construction which would leave corporations liable to be called upon to make discovery without enabling them to avail themselves of it in their favour. It seems to me that the question presents no real difficulty. The 50th section commences,—“Upon the application of *either party* to any cause.” What can that mean but that either party shall have the benefit of the enactment? And in this very section, the answer, if the party is a body corporate, is to be by “some officer to be named of such body corporate.”(a) Under s. 52, the affidavit is to be made by the party and his attorney or agent. It is not necessary to say here by whom the affidavit should be made; it is enough to say that the affidavit of the company’s attorney is sufficient. I think we should be coming to a very absurd conclusion, if we interpreted this section in any other way. Rule absolute.

(a) Here the order was upon the company’s secretary.

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*DE CUADRA v. SWANN. May 31.

1. Where a ship is by perils of the sea so much damaged as to be incapable of repair so as to prosecute the adventure, except at an expense exceeding her value together with the freight when repaired, the master is justified in abandoning the voyage, and is not bound as agent of his owner to send the goods on in another bottom.

2. In an action upon a policy on goods from Cadiz to Monte Video and Buenos Ayres, and also “on cash on account of freight, 216*l.*,” the declaration alleged the shipment of the goods and the prepayment of the 216*l.* on account of freight, and then proceeded to aver that, whilst prosecuting the voyage, the vessel encountered a storm, and sustained so much damage that she became and was disabled from proceeding without being repaired, and could not be repaired so as to proceed on the voyage without incurring an expense *greater than her value would have been when repaired, together with the freight which she would have earned on the said voyage*; that, the ship being so disabled from continuing the voyage with the goods on board, the master was obliged to and did abandon the voyage and the earning of the residue of the freight; that the freighter procured two other vessels to carry the goods on, at a rate of freight exceeding the freight originally payable under the charter-party; and that the 216*l.* so paid in cash on account of freight as aforesaid, by reason of the premises, became and was wholly lost to the plaintiff. The declaration then went on to aver that one of the substituted vessels sustained so much damage that she was obliged to put back to Gibraltar, and there unload, and the goods were sent on to Monte Video by the other; and that, by reason of the premises, the plaintiff sustained a total loss of the 216*l.* so paid in cash on account of freight as aforesaid, and was put to charges in transshipping the goods, &c. :—Held, that the declaration disclosed a sufficient justification for the master’s abandoning the voyage, and consequently that the plaintiff was entitled to recover as for a total loss of the prepaid freight.

3. Plea, that the substituted vessel into which the goods were first transhipped, at the time the goods were first at risk on board of her was not seaworthy :—Held, a bad plea.

THE declaration stated, that the plaintiff, theretofore, to wit, on the 13th of August, 1860, according to the usage and custom of merchants, caused to be made a policy of insurance to the plaintiff, being

therein described by the name of B. de Cuadra, to the tenor following, that is to say, &c.,—setting out a policy on goods on board the ship Richmond at and from Cadiz to Monte Video and [or] Buenos Ayres, both or either, on goods and merchandises, &c., valued at 966*l.*,—“on 273 lasts salt valued at 300*l.*, on 95 butts West India rum valued at 450*l.*, on cash on account of freight 216*l.*;” with the following memorandum:—“N. B. Corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general or the ship be stranded; sugar, tobacco, hemp, flax, hides, and skins, are warranted free from average under 5*l.* per cent., and all other goods, also the ship and freight, are warranted free from average under 3*l.* per cent., unless general or the ship be stranded: warranted free from *capture and seizure, and the consequences of any attempts [*773 thereat:” Averment, that thereupon, in consideration that the plaintiff, at the request of the defendant, then paid to him the sum of 3*l.* as a premium or reward for the insurance of 100*l.* of and upon the premises in the said policy mentioned, and then promised the defendant to perform all things in the said policy contained on the part of the insured to be performed, the defendant then promised the plaintiff that he the defendant would become and be an insurer to the plaintiff of the said sum of 100*l.* upon the premises in the said policy mentioned, and would perform all things in the said policy on his part as such insurer to be performed; and the defendant then became and was an insurer to the plaintiff, and then duly subscribed the said policy as such insurer of the said sum of 100*l.* upon the premises in the said policy in that behalf mentioned: That the said goods in the said policy mentioned, and on and in respect of which goods the said insurance was made, were shipped and loaded in and on board the said ship in the said policy mentioned, at Cadiz aforesaid, to be carried and conveyed on freight therein and thereby on the said voyage, the said freight being payable by one M. F. Paul, and the said M. F. Paul paid the said 216*l.* in cash on account of the said freight, and the said M. F. Paul was then and continually afterwards until and at the time of the losses thereafter mentioned interested in the said goods and in the said payment and subject-matters of the said insurance to the value and amount in the said policy in that behalf mentioned, and the said insurance was made for the use and benefit and on account of the said M. F. Paul; and the said ship with the said goods on board thereof departed and set sail from Cadiz aforesaid on the said voyage towards Monte Video or Buenos Ayres aforesaid; and *afterwards, and whilst the said ship was pro- [*774 ceeding on her said voyage, and before her arrival at Monte Video or Buenos Ayres aforesaid, the said ship with the said goods so on board thereof as aforesaid, on the high seas, by the violence of the winds and waves, and by stormy and tempestuous weather, and by those and other perils of the seas, became and was greatly damaged and opened in her seams and between her planks, rendered leaky, and greatly filled with water, and in consequence thereof the said ship became and was disabled from proceeding on the said voyage without being repaired as to the said damage so by her sustained as aforesaid; and in consequence thereof, and for the purpose of such repair, and the safety and preservation of the said ship and goods, she was forced

and obliged to and did run for and put into a harbour, to wit, at Gibraltar; and the said ship was then found to be, and was, by reason of the premises, so damaged that she could not be repaired, so as to proceed on the said voyage, without incurring an expense greater than her value would have been when repaired, together with the freight which she would have earned on the said voyage; and the said ship, having been by reason of the premises disabled from continuing or proceeding on the said voyage with the said goods on board, the master of the said ship was obliged to and did wholly abandon the said voyage and the earning of the residue of the said freight; and the plaintiff was obliged to and did procure certain other vessels, to wit, the Boa Fe and the Borgund, for the purpose of having the said goods conveyed upon the said voyage to Monte Video aforesaid, for certain other freight payable by the plaintiff in that behalf, and exceeding the freight originally payable under the said charter-party for the conveyance of the said goods on the said voyage; and *775] the said sum of 216*l.* so paid in cash *on account of freight as aforesaid by reason of the premises became and was wholly lost to the plaintiff, and it became and was necessary and proper to unload, and the said goods were accordingly unloaded from the said ship, and part of the same were transhipped and loaded on board the said ship called the Boa Fe, and the residue of the said goods were transhipped and loaded on board the said ship or vessel called the Borgund, for the purpose of having the same conveyed to Monte Video aforesaid: That afterwards the said ship Boa Fe, with the said portion of the said goods on board thereof, departed and set sail from Gibraltar aforesaid on her voyage towards Monte Video aforesaid; and afterwards, and whilst the said ship Boa Fe was proceeding on her said voyage, and before her arrival at Monte Video aforesaid, the said ship "Boa Fe," with the said portion of the said goods so on board thereof as aforesaid, on the high seas, by the violence of the winds and waves, and by stormy and tempestuous weather, and by those and other perils of the seas, became and was greatly damaged and opened in her seams and between her planks, rendered leaky, and greatly filled with water, and in consequence thereof the said ship Boa Fe became and was wholly disabled from proceeding on her said voyage without being repaired as to the said damage so by her sustained, as aforesaid; and, in consequence thereof, and for the purpose of such repairs, and the safety and preservation of the said ship Boa Fe, and the said portion of the said goods, she was forced and obliged to and did run for and put back into the said harbour of Gibraltar aforesaid; and, the said ship Boa Fe having been by reason of the premises disabled from continuing or proceeding on the said voyage with the said goods to Monte Video aforesaid, it became and was *776] necessary and proper to unload, *and the said goods were accordingly unloaded from the said ship, and transhipped and loaded on board the said ship Borgund, to be conveyed to Monte Video aforesaid; and in consequence and by reason of the premises the plaintiff sustained a total loss of the said sum of 216*l.* so paid in cash on account of freight as aforesaid; and in consequence and by reason of the premises the plaintiff further sustained great loss and damage in respect of the said goods, by the perils insured against, to

an extent exceeding 3 per cent., and was put to expense and divers charges in and about unloading the said goods from the said ships, and transhipping the same as aforesaid, and warehousing and taking care of the said goods after the same were unloaded as aforesaid, and procuring the conveying and carrying of the same to Monte Video aforesaid otherwise than by the said ship in the said policy mentioned, and in paying extra and other and higher freight and charges for the same, and otherwise in labouring and travelling for and in and about the defence, safeguard, and recovery of the said goods; and thereupon the defendant became and was liable to pay and ought to have paid to the plaintiff a certain sum of money, to wit, 59*l.* 1*s.* 5*d.*, being his, the defendant's, proportion of the said losses for and in respect of the said sum of 100*l.* so by him insured as aforesaid: Yet the defendant had not paid the same: And the plaintiff had done and performed all things, and all things had happened and times had elapsed to entitle the plaintiff to have paid and made good to him his said losses; and to have payment made to him by the defendant of the said sum of 59*l.* 1*s.* 5*d.*, according to the said policy, and to maintain this action: Claim 100*l.*

Seventh plea, as to the causes of action so far as they relate to the goods shipped on board of the *Boa Fe*, *and the alleged loss [*777 and charges in respect thereof after such shipment, that the said ship *Boa Fe*, at the time when the said goods were first at risk on board of her, was not seaworthy.

"And the defendant, as to the declaration so far as relates to the alleged breaches and causes of action *in respect of the salt therein mentioned*, says that the declaration is bad in substance:

"And the defendant, as to the declaration so far as relates to the alleged breaches and causes of action *in respect of the other goods herein mentioned except salt*, says that the declaration is bad in substance:

"And the defendant, as to the declaration so far as relates to the alleged breaches and causes of action *in respect of cash on account of freight therein mentioned*, says that the declaration is bad in substance." (a)

The ground of demurrer stated in the margin was,—“that, as there was no loss of ship, and the goods were not in peril when the alleged charges were incurred, and have sustained no actual damage, the declaration does not disclose any loss of freight or goods within the meaning of the policy.” Joinder.

The plaintiff also demurred to the seventh plea, the ground stated in the margin being, “that the seventh plea shows no defence to the action.” Joinder.

Hannen, for the plaintiff. (b)—The declaration is good, and the

(a) These demurrers were substituted, by way of amendment, for a general demurrer to the whole declaration.

(b) The points marked for argument on the part of the plaintiff were as follows:—

“1. That the declaration discloses a loss within the meaning of the policy, and a good ground of action:

“2. That, under the circumstances disclosed in the declaration, the master was justified in law in abandoning the voyage and the earning of the residue of the freight:

“3. That the seventh plea is bad, on the ground that the mere fact that the ship into which the goods were transhipped not being seaworthy at the time when the goods were first at risk on board of her, is no defence to the action:

*778] plaintiff entitled to recover. In **De Silvale v. Kendall*, 4 M. & Selw. 37, prepaid freight and advances were held not to be recoverable back by the freighter from the master upon a loss of the ship by capture. But, in *Ellis v. Lafone*, 8 Exch. 546, the freighter was held entitled to recover it as against the underwriters. In *Hall v. Janson*, 4 Ellis & B. 500 (E. C. L. R. vol. 82), money advanced on account of freight was held to be an insurable interest in the shipowner. Upon a ship becoming disabled by perils of the sea, it is no part of the captain's *duty* to send the goods on to their destination: he is only at liberty to do so if he pleases; and, if any extra freight be incurred, it will be at the cost of the freighter. The question whether the captain was bound to forward the goods, was raised in *Shipton v. Thornton*, 9 Ad. & E. 314 (E. C. L. R. vol. 36), 1 P. & D. 216, but not decided. There, the goods were shipped under a bill of lading in a general ship, which was prevented from completing the voyage in consequence of damage occasioned by tempest. Lord Denman, in delivering the judgment of the court, said: "It is clear, that, by the contract, the shipowner (and the master as his agent) is bound to carry the goods to their destination, if not prevented from doing so in his own ship by some event which he has not occasioned, and over which he has no control. 'The master,' says Lord Tenterden, *779] in his book on Shipping, part 3, ch. 3, § 8 b, 'should *always bear in mind that it is his duty to convey' the cargo 'to the place of destination. This is the purpose for which he has been intrusted with it; and this purpose he is bound to accomplish by every reasonable and practicable method.' When, however, such an event has occurred to interrupt the voyage as above defined, and the shipowner or master (for, we think no distinction can be made between the two) has no opportunity of consulting the freighter, there seems to be much disagreement in foreign ordinances and jurists on the point whether or no he is *bound* to tranship, or whether, having contracted only to carry in his own ship, he is not absolved from further prosecution of the enterprise by the vis major which prevents his accomplishing it in the literal terms of his undertaking. By the Rhodian law, (a) the laws of Oleron, s. 4, (b) and the ordinances of Wisbuy, art. 16, (c) the master was at liberty, but was not bound, to tranship: the old French Ordinance, on the other hand, in precise terms imposed the obligation upon him; 'en cas que le vaisseau ne puisse estre racommodé, le maistre sera obligé d'en louer incessamment un autre:' Art. 11, Titre *Du Fret*, (d) The terms of this ordinance occasioned, however, much controversy. Pothier (e) and Valin (g)

"4. That there was no obligation on the part of the insured that it should be so, and that the plea does not show that the plaintiff had any notice or knowledge of the fact, or was guilty of any improper conduct in the shipment or on board the vessel."

(a) See the Greek text in Pardessus, *Collection de Lois Maritimes*, tom. 1, p. 256, Ch. vi. s. 42.

(b) Pardessus, *Collection de Lois Maritimes*, tom. 1, p. 325, Ch. viii. art. 4.

(c) Pardessus, *Collection de Lois Maritimes*, tom. 1, p. 472, Ch. xi. art. 18.

(d) Liv. iii. tit. iii. Pardessus treats this as copied from the 4th article of the laws of Oleron, before cited. *Collection de Lois Maritimes*, tom. 4, p. 362, Ch. xxvi.

(e) *Œuvres*, tom. 2, p. 394, ed. 2 (1781), *Contrats de Louages Maritimes*, part 1 (*Charte-partie*), sect. 3, art. 2, § 3, num. 68.

(g) *Nouveau Commentaire sur l'Ordonnance de la Marine*, lib. iii. tit. iii (*Du Fret ou Nolis*), art. 11, tom. 1, p. 651 (ed. 1766).

*maintaining that they were not imperative, except as the condition of earning full freight; Emérigon, on the other hand, [*780 insisting that the duty was strictly cast upon the master, as the agent of the freighters.(a) The modern French code appears to adopt this view of the question: the words of the Code de Commerce, s. 296 (Liv. ii. tit. 8), are, on this point, almost the same as those we have cited from the Ordinance; and it is stated by Chancellor Kent, who, in his Commentaries, Vol. 3, p. 210-213, 3d edit.), very ably and learnedly sums up the whole question, that Boulay-Paty(b) and Pardessus(c) in their commentaries on it have agreed in holding to the construction adopted by Emérigon. All authorities, however are in unison to this extent, that 'the master is *at liberty* to procure another ship to transport the cargo to the place of destination:' and in these words Lord Tenterden cautiously lays down the rule of our law: p. 240, part 3, c. 3, s. 8. It may therefore be safely taken to be either the duty or the right of the shipowner to tranship in the case above supposed: if it be the former, it must be so in virtue of his original contract; and it should seem to result from a performance by him of that contract that he will be entitled to the full consideration for which it was entered into, without respect to the particular circumstances attending its fulfilment: on the other hand, if it be the latter, a right to the full freight seems to be implied: the master is at liberty to tranship: but, for what purpose, except for that of earning his full freight at the rate agreed on?"(d) *Further on he says: "One question, however, has been [*781 asked, which it will not be right to pass over. What, it has been said, if the transshipment can only be effected at a higher than the original rate of freight? Which party is to stand to that loss? By the French Ordinance(e) and the Code de Commerce (art. 350, 393), and, according to the decisions in America (to which Chancellor Kent refers, 3 Com. 212), the shipowner is entitled to charge the cargo with the increased freight, and, as a consequence of that rule, it becomes an average loss; and, in case of an insurance, must be made good by the insurers: Emérigon, *Traité des Assurances*, Ch. xii. s. 16, tom. 1, p. 426; Code de Commerce, Liv. ii. tit. 10, art. 350. No case of the sort that we are aware of has occurred in this country; nor is it necessary for us to express any opinion further than as it bears on the present question. It may well be that the master's right to tranship may be limited to those cases in which the voyage may be completed on its original terms as to freight, so as to occasion no further charge to the freighter; and that, where the freight cannot be procured at that rate, another but familiar principle will be introduced,—that of agency for the merchant. For, it must never be forgotten that the master acts in a double capacity, as agent of the owner

(a) *Traité d'Assurances*, tom. 1, p. 423 (ed. 1827), ch. xii. s. 16.

(b) *Cours de Droit Commercial Maritime*, tom. 2, p. 400-405 (edit. 1834), tit. 7, s. 8.

(c) See *Cours de Droit Commercial*, tom. 1, p. 363 (edit. 6), part 4, tit. 4, c. 2, s. 715.

(d) In that case the shipowner was held to be entitled to the full amount of freight originally stipulated for, though by the substituted conveyance they were carried at a less freight.

(e) See Emérigon, *Traité des Assurances*, Tom. 1, p. 424, ch. xii. s. 16, from which it seems that the only authorities in the ordinance are that already cited (liv. iii. tit. 3, art. 11), and liv. iii. tit. 3, art. 21, which is as follows,—"*Le maistre sera aussi payé du fret des marchandises sauvées du naufrage, en leur conduisant au lieu de leur destination.*" Pardessus, tom. 4, p. 363.

as to the ship and freight, and agent of the merchant as to the goods.

*782] These interests may sometimes conflict with each other; and *from that circumstance may have arisen the difficulty of defining the master's duty under all circumstances in any but very general terms. The case now put supposes an inability to complete the contract on its original terms in another bottom, and therefore the owner's *right* to tranship will be at an end; but still, all circumstances considered, it may be greatly for the benefit of the freighter that the goods should be forwarded to their destination, even at an increased rate of freight; and, if so, it will be the duty of the master as his agent to do so." If this be so, the freight already paid will have been lost, and consequently the merchant will have a right to recover against the insurer. That judgment seems to exhaust all the law upon the subject. According to *Gibbs v. Grey*, 2 Hurlst. & N. 22, the liability for the extra freight would fall upon the owner of the goods. The next case upon the subject is *Matthews v. Gibbs*, 30 Law J., Q. B. 55. The defendants chartered in London the ship *Planter* to bring a cargo of guano from Callao, in South America, to England, at 70s. per ton. At Callao advances were made on account of freight to the captain by the defendants' agents, pursuant to the charter-party. After the *Planter* had sailed with her cargo, she was compelled by sea-damage to put back to Callao, and became unable to proceed on her voyage. The defendants' agents declining to interfere, the captain chartered the *Alarm*, of which the plaintiff was master and apparent owner, to bring the cargo to its destination, and it was accordingly transhipped. The captain of the *Planter* chartered the *Alarm* in his own name, and bills of lading were made out to him as shipper, the defendants being named as the consignees. In the charter-party of the *Alarm* the freight named was 70s., the then current freight at Callao being only 40s.; and by private arrangement between them, the

*783] *plaintiff was to pay over to the captain of the *Planter* the difference between the two rates. On the arrival of the *Alarm* in England, the plaintiff demanded the whole of the freight at 70s.: but the defendants refused to pay more than the balance after deducting the advances to the *Planter*. It was held, on the above facts, the court having liberty to draw inferences,—first, that the charter-party of the *Alarm* must be taken to have been made by the captain of the *Planter* on behalf of his owners, and not on behalf of the defendants,—secondly, that, assuming the captain of the *Planter* to have been acting on behalf of the defendants, he could not bind them by the contract, it being a fraud upon them to the knowledge of the plaintiff, and also being beyond the limits of the authority conferred by the necessity of the case upon the captain to act as the agent of the owner of the cargo,—thirdly, there being no contract to bind the defendants, that, assuming the original shipowner to be able to transfer his lien for freight to the new shipowner, when compelled by necessity to tranship the cargo in order to carry it to its destination, he could transfer only the same right as he himself possessed, and that therefore the plaintiff had no lien on the guano for more than the balance due on the original charter-party, after deducting the advances to the planter. [WILLES, J.—Is not the captain only negotiorum testor? Is there any authority for saying that the owner of the second vessel

has a right to maintain an action against the owner of the goods? No doubt there is a lien. But that a second *debt* could be created in respect of the same goods, without a ratification, is what I must doubt.] That is a proposition which the plaintiff is not interested in maintaining here. [BYLES, J.—Do you contend that you have sustained a total loss of the pre-paid freight?] Yes. The sending the goods on at *an increased freight is only justifiable under [*784 the general authority to send them on for the benefit of both. But the owner was not *bound* to send them on at an increased rate of freight which was to be borne by him. His engagement is, to carry the goods in a particular ship. If his vessel becomes unable from sea-damage to perform the voyage, and he can find another to convey the goods to their destination at the same rate of freight, it is his duty to send them on. But it is no part of the captain's duty to send the goods on if his so doing will charge his owners with an increased freight. The subject is thus treated by Emérigon, *Traité des Assurances*, Ch. xii. s. 16, Tom. 1, p. 423 :—“ L'Ordonnance est précise : le maître est *obligé de louer incessamment un autre navire*, et il n'est dispensé de cette obligation formelle, que dans le cas où il ne puisse pas en trouver. Je crois donc que M. Valin, art. 11, tit. Du Fret, et M. Pothier, *Traité des Charte-parties*, no. 68, se trompent lorsqu'ils disent 'que les termes de l'article 11, sera tenu d'en louer incessamment un autre, doivent s'entendre en ce sens, sera tenu s'il veut gagner en entier son fret, et non pas en ce sens, qu'il y soit tenu précisément et absolument; car par le contrat de louage qu'il a fait de son vaisseau, il ne s'est obligé qu'à fournir son vaisseau, il ne pas obligé d'en fournir un autre; et lorsque, par une force majeure, dont il n'est pas garant, il ne peut plus le fournir, il n'est, selon les principes du contrat de louage, obligé à autre chose qu'à décharger l'affréteur ou locataire du fret pour ce qui restait à faire du voyage, lequel, en ce cas, doit lui être payé seulement pour ce qui en a été fait.' La doctrine de ces deux auteurs serait bonne, si le chargeur était présent, ou qu'il fut à portée de chercher par lui-même un autre navire. Tel est le cas de l'art. 7 de la déclaration de 1779. 'Lorsque le navire,' est-il dit, 'aura *été condamné comme étant hors d'état de continuer sa navigation, les assurés sur la marchandise seront tenus de le faire [*785 incessamment signifier aux assureurs, lesquels, ainsi que les assurés, feront leurs diligences pour trouver un autre navire, sur lequel les dites marchandises seront chargées, à l'effet de les transporter à leur destination.' Mais, si l'accident est arrivé en pays lointain, sans que les chargeurs puissent donner leur ordre, ni par eux-mêmes, ni par leur commissionnaire, il n'est pas douteux que le capitaine, qui n'est pas moins le préposé des chargeurs que celui des armateurs, ne doive veiller à la conservation de la marchandise, et faire tout ce que les circonstances exigent pour le mieux. Sa qualité de capitaine le rend *maître*, et lui défère le soin de tout ce qui concerne le navire et la cargaison. Il est responsable de toutes les marchandises chargées dans son bâtiment, dont il est tenu de rendre compte : Art. 9, titre Du Capitaine. Il est donc obligé de faire ce qu'il est à présumer que feraient les chargeurs s'ils étaient présents. L'Art. 45, titre Des Assurances, en parlant de l'assuré, s'applique au capitaine. La question se présente en notre Amirauté. Le capitaine Adrianus Vanstock, hollandais,

commandant le vaisseau l'Adam, avait frété son navire aux frères Mousse, pour aller prendre un chargement de riz à Damiette, et l'apporter à Marseille, moyennant 18,000 liv. de fret, et 2 pour 100 de chapeau. Le navire fut à Damiette. Il prit son chargement; mais, à son retour, il essuya près de Majorque une violente tempête. Il fit jet. Il voulut se réfugier à terre: on refusa de l'y recevoir par la crainte de la peste, attendu qu'il venait du Levant. Il fut impossible au capitaine de radoubier son vaisseau. On lui envoya cinq petits bâtimens, dans lesquels il transborda partie de sa cargaison et les agrès. Les Espagnols mirent le feu au navire. Le magistrat de *786] Majorque fixa à 15,000 liv. le *fret des cinq petits bâtimens dont on vient de parler, lesquels arrivèrent à Marseille portant le capitaine hollandais, son équipage, et les effets sauvés. Ce capitaine demanda le paiement de son fret à *proportion du voyage avancé*. On prétendit que les marchandises sauvées ayant été conduites à Marseille, le nolis lui était dû en entier, mais sous la déduction non seulement du nolis relatif aux marchandises perdues, mais encore des 15,000 liv. du fret dû aux cinq petits bâtimens espagnols. Il répondit que le voyage avait été terminé par la perte du navire; que cependant il n'avait dû rien oublier pour la conservation de la marchandise; qu'il avait été obligé de louer d'autres bâtimens pour la conduire au lieu de la destination; qu'il serait inique, qu'ayant perdu son vaisseau, il fût surchargé d'un nolis qui absorberait le fret qui lui avait été promis; que, d'après le système qu'on lui opposait, la loi ne serait pas égale. Le capitaine qui ne peut trouver un autre navire, est payé de son fret; pourquoi donc le capitaine qui conserve la marchandise et la conduit dans le lieu de la destination, serait-il ruiné par le fret excessif du navire subrogé? Tel n'est pas l'esprit de l'Ordonnance. Le capitaine n'est *obligé* de louer un autre navire qu'en qualité de facteur. Il doit alors avoir le choix, ou de demander son fret en entier, auquel cas le fret du navire subrogé est à sa charge, ou de réduire son fret à proportion du voyage avancé, auquel cas le nolis du navire subrogé est à la charge de la marchandise sauvée. Ces raisons étaient aussi pressantes que légales. Cependant le tribunal de notre Amirauté, ébloui par les articles de l'Ordonnance ci-dessus cités, décida, par sentence du 30 Juillet, 1748, que les frères Mousse paieraient 'les 18,000 liv. de fret, et les 2 pour 100 de chapeau, portés par la charte-partie, sous la déduction du prorata du nolis concernant le riz perdu et submergé, et sous la *787] **déduction encore du nolis des bâtimens frétés à Majorque pour le transport du chargement*, lesquelles déductions seraient faites par experts, et condamna le capitaine aux dépends.' M. Valin, art. 11, titre Du Fret, semble approuver cette sentence. 'C'est aussi,' ajoute-t-il, 'ce qui me confirme dans l'idée que le maître, dans le cas de notre article, ne peut pas être forcé de prendre à fret un autre navire; autrement, nul doute que ce ne fût aux frais des marchands chargeurs pour l'excédant du fret convenu entre eux et le maître, à moins qu'il n'y eût en tout cas l'excès dans la stipulation du fret du navire subrogé, parcequ'alors le maître serait présumé avoir sacrifié les intérêts des marchands chargeurs, sans l'aveu desquels il ne lui était pas permis d'aggraver leur condition.' Mais il est beaucoup mieux qu'en pareil cas le capitaine soit, d'une part, *obligé* de louer un

autre bâtiment, et que de l'autre, le surcroît de fret soit pour le compte de la marchandise et des assureurs. Telle est la décision de la déclaration de 1779, art. 9." (a) The authorities are all collected in Maclachlan on Shipping, pp. 364 et seq. He at p. 366 quotes the following passage from 3 Kent's Commentaries 212,—'In this country (America), we have followed the doctrine of Emérigon and the spirit of the English cases, and hold it to be the duty of the master, from his character of agent of the owner of the cargo, which is cast upon him from the necessity of the case, to act in the port of necessity for the best interest of all concerned; and he has powers and discretion adequate to the trust, and requisite for the safe delivery of the cargo at the port of destination. If there be another vessel in the same or in a contiguous port, which can be had, the duty is clear and imperative *upon the master to hire it; but still the master is to exercise a sound discretion adapted to the case.' " And he adds,— [*788 "The 'spirit of the English cases' decided since that passage was written, are not favourable to a liberal construction of any implied authority of the master in respect of the cargo, as agent of the proprietor; and whether his obligation with regard to it extends to any other than his own ship, still remains to be determined by the courts of this country:" citing, *Cammell v. Sewell*, 3 Hurlst. & N. 617 (in error, 5 Hurlst. & N. 728), *Vlierboom v. Chapman*, 13 M. & W. 230, *Duncan v. Benson*, 1 Exch. 537 (in error, 3 Exch. 644), *Hunter v. Prinsep*, 10 East 378, 393, and *Shipton v. Thornton*, 9 Ad. & E. 314 (E. C. L. R. vol. 36), 1 P. & D. 216. At p. 428, Mr. Maclachlan analyzes the case of the *Adam Vanstock*, referred to by Emérigon, and adds: "Emérigon, dissatisfied with this decision, is certain that it would have been reversed upon appeal, and states, in accordance with the declaration of 1779, what seems now to be the received law of France on this question, that it is the duty of the master to hire another vessel, and that any excess over the agreed freight is a burthen to be borne by the merchant and the assurers." [WILLES, J.—Here, the shipper has repossessed himself of his goods, and has carried them on to their destination.] The assurers engaged to indemnify the plaintiff against any loss from perils of the sea to the sum advanced on account of freight. The allegation in the declaration sufficiently shows a constructive total loss of the ship, and consequently a total loss of the pre-paid freight: *Moss v. Smith*, 9 C. B. 94; Per Kent, C. J., in *Mumform v. Commercial Insurance Company*, 5 Johnson 262, 265. [WILLES, J.—As to the freight, I cannot see any difficulty.] In *Rosetto v. Gurney*, 11 C. B. 176, 188 (E. C. L. R. vol. 73), Jervis, C. J., says: "If the master tranships because the original ship is irreparably damaged, without *considering whether he is bound [*789 to tranship, or merely *at liberty* to do so, it is clear that he tranships to earn his full freight; and so the delivery takes place upon the original contract. It may happen that a new bottom can only be obtained at a freight higher than the original rate of freight. It does not seem to have been settled whether, in that case, the ship-owner may charge the cargo with the additional freight. By the French law, he *may* do so: and, as a consequence of that rule, the

(a) Emérigon adds,—“La sentence de notre tribunal aurait été sans doute reformée, si le capitaine Vanstock en eût appelé.”

increased freight would be an average loss, to be added to the other items: see *Shipton v. Thornton*." [WILLIAMS, J.—That is only a doubtful statement of the law.] As to the expenses, the point is set at rest by the recent cases of the *Great Indian Peninsular Railway Company v. Saunders*, 1 Best & Smith 41 (E. C. L. R. vol. 101), in error, 2 Best & Smith 266, (E. C. L. R. vol. 110), and *Booth v. Gair*, 15 C. B. N. S. 291 (E. C. L. R. vol. 109). [WILLES, J.—That point may arise on the trial; but I do not see how it is material upon this demurrer.]

Archibald, contra.(a)—The insurance is upon three several subject-matters, viz. cash advanced on account *of freight, the salt, *790] and the other goods. As to the salt, that being by the memorandum free from average, the plaintiff's only claim in respect of that would be under the suing and labouring clause. [BYLES, J.—If there be any loss, total or partial, of any one article stated in the declaration, the declaration is good.] No doubt. [BYLES, J.—The declaration alleges that which amounts to a constructive total loss of the ship; and it is averred that it was necessary to do what was done, and that a total loss of the 216*l.* pre-paid freight has accrued. This seems to be trying on a verbal criticism that which a jury would dispose of in a moment.] There is not enough shown here to establish a total *791] *loss of freight or goods. Abandonment by the captain, though it may have been prudent, is not one of the perils insured against by underwriters on freight and goods: *M'Carthy v. Able*, 5 East 388. The circumstance that freight has been actually earned does not make any difference in principle. There are many cases to show that a mere delay or retardation of the voyage does

(a) The points marked for argument on the part of the defendant were as follows:—

Upon the demurrer to the declaration,—"1. That the declaration does not within the meaning of the policy disclose any loss of the cash alleged to have been advanced on account of freight, or any right to indemnity in respect of charges, or any liability to make good the same:

"2. That the loss of freight advanced was caused by the voluntary act of the captain in abandoning the voyage, for which the defendant is not answerable, and not by any of the perils insured against:

"3. That the declaration does not show an absolute loss of the *Richmond*, or absolute inability to prosecute the voyage, but merely that the repairs would have caused delay, and that such delay would not within the meaning of the policy have occasioned any loss of the goods or the freight advanced:

"4. That it was the duty of the captain of the *Richmond*, under the circumstances, to have forwarded the goods to their destination, and that the defendant is not answerable for any breach of such duty:

"5. That the plaintiff ought to have given notice of abandonment of the freight advanced; and, in the absence of such notice, is not entitled to recover:

"6. That the declaration does not show any constructive total loss of the *Richmond*, and that consequently there was no loss of the freight advanced:

"7. That it is consistent with the declaration that the other freight agreed to be paid at Gibraltar did not exceed the balance of freight (beyond the amount advanced) originally payable for carriage by the *Richmond*, and consequently that there does not appear to have been any loss of the freight advanced."

As to the alleged loss by charges,—"8. That none is shown, because it does not appear that at the time of the alleged charges and labouring and travelling the goods were in peril."

As to the seventh plea,—"9. That, there having been no loss, absolute or constructive, of the *Richmond*, and the goods not having been at the time of transhipment in actual peril, the plaintiff was not entitled to forward them except in a sea-worthy vessel:

"10. That, if the *Boa Fé* was lawfully substituted, under the circumstances, for the *Richmond*, the warranty of sea-worthiness was likewise transferred, and attached to her."

not constitute a loss either of goods or freight, so as to warrant an abandonment: *Anderson v. Wallis*, 2 M. & Selw. 240; *Everth v. Smith*, 2 M. & Selw. 278; *Falkner v. Ritchie*, 2 M. & Selw. 290; *Mordy v. Jones*, 4 B. & C. 394 (E. C. L. R. vol. 10), 6 D. & R. 479. The last is a very strong authority. In an action on a policy of insurance on freight, it appeared that the ship, in the course of her voyage, having been injured by a peril of the sea, was obliged to put into a port and land the whole of her cargo. Part of the cargo had been so wetted by sea-water that it could not be reshipped without danger of ignition, unless it went through a process which would have detained the vessel six weeks, and have been attended with expense equal to the freight. Under these circumstances, the master sold these goods, and, finding he could not obtain others, he sailed on his voyage, and arrived at his port of destination with the rest of his cargo. The master's proceedings were such as a prudent man uninsured would have adopted. It was held that the underwriters were not liable for the loss of the freight of these goods. "It is very proper," said Abbott, C. J., "that the master should exercise a discretion whether it be more fit to leave the goods behind, and give up the value of the freight, than to bring them home. But it by no means follows as a consequence, that, if he does in the sound exercise of his discretion leave part of the goods behind, and his owner thereby loses freight pro tanto, he can throw that loss on the *under- [*792 writer."(a) That shows the real distinction in these cases. The term "constructive total loss" in reality only describes that which is a partial loss. The same principle is recognised in *Philpott v. Swann*, 11 C. B. N. S. 270 (E. C. L. R. vol. 103). [WILLES, J.—The judgment there turns on the slightness of the repairs needed, and the means of repair being within a reasonable distance. The court, however, adopt the observations of Maule, J., as to the prudent owner principle, in *Moss v. Smith*, viz. "that the prudent owner principle only applies to constructive total loss of ship or constructive total loss of cargo by damage *thereto*, not to expense and labour of earning freight."] That is the principle on which we rely here. The captain was merely deterred by the expense from carrying the cargo on to its destination. In the case of freight, there is nothing to abandon: the underwriter can derive no advantage from it. [ERLE, C. J.—If the ship is capable of being repaired so as to carry on the cargo and earn freight, at whatever cost, you contend that there can be no constructive total loss of freight? It must be an absolute impossibility?] A reasonable or practical impossibility. [ERLE, C. J.—If so, the only question is as to the meaning of the averments in this declaration. Do they show such an extent of damage to the ship as to amount to a constructive total loss?] In *Ogden v. The General Mutual Insurance Company*, 2 Duer 204, 215, Bosworth, J., says: "The underwriters on freight do not contract that the voyage shall yield a profit to the assured, nor that it shall not cost him more to deliver the cargo according to the terms of the bill of lading than the aggregate gross amount of freight payable on delivery of the cargo,

(a) See the criticism on Mr. Phillips's observations on this case (Ph. on Ins. § 1142), in the judgment in *Philpott v. Swann*, 11 C. B. N. S. 281 (E. C. L. R. vol. 103).

*793] or the sum named in *the policy as the measure of the underwriters' liability in case of total loss." (a) [BYLES, J.—"More than the freight." Here, the cost of repair would it is alleged have been more than the value of "the ship and freight."] Does that make any difference? If the averments in the declaration amount to a constructive total loss, and nothing more, it is submitted it does not go far enough to show that the captain was warranted in abandoning the voyage, as between the assured and the insurer on freight. For anything that appears, he may have repaired her and gone elsewhere. [WILLES, J.—That would not have earned the freight.] Assuming that there was a justifiable abandonment of the voyage, there is nothing on the face of the declaration to show that any part of the cargo was in peril either at the time of the transshipment or during the subsequent voyage. As to this point, the case is governed by *The Great Indian Peninsular Railway Company v. Sanders*, 1 Best & Smith 41, in error, 2 Best & Smith 266, and *Booth v. Gair*, 15 C. B. N. S. 291 (E. C. L. R. vol. 109). The charges mentioned in the declaration were charges incurred by the captain in the discharge of his duty to his owner. [BYLES, J.—This point is immaterial, if we are against you upon the other. WILLES, J.—It will arise upon the evidence.] No doubt.

ERLE, C. J.—When the facts are ascertained, it will be a useful consumption of time to apply the law to them. At present, we have only to determine whether or not the declaration is sufficient. Upon that I decide in favour of the plaintiff, on the ground that there is such an allegation of damage to the ship as would justify the master in abandoning the voyage, and not to make it his duty to tranship the *794] cargo and *send it on in another vessel as agent and at the expense of his owner. Enough, I think, is shown on the face of the declaration to warrant the abandonment of the voyage. If that be so, there has been a total loss of the pre-paid freight. Upon that short ground, I think, the demurrers as to the goods being struck out, the plaintiff is entitled to judgment.

WILLIAMS, J.—I am of the same opinion. It appears from the allegations in the declaration that the master was justified in abandoning the voyage. The necessary consequence of that was, that the plaintiff lost the pre-paid freight, and therefore he is entitled to recover it from the underwriters upon this policy.

WILLES, J.—I am of the same opinion. To the authorities already cited, I would add the case of *Hickie v. Rhodocanachi*, 4 Hurlst. & N. 455, which went to establish upon reasonable grounds that the captain is the agent of the shipowner. There, a ship having been chartered to carry troops to Calcutta, by a charter-party under which a portion of the freight was made payable on the completion of the voyage, when about 700 miles beyond the Mauritius, caught fire. The ship put back to the Mauritius, where, being found to be greatly damaged, she was abandoned to the underwriters as totally lost, and the abandonment was accepted. The captain having chartered another ship, and forwarded the troops to Calcutta, the freight was received by the shipowner's agents: and it was held, that, in forwarding the troops, the captain acted as agent for the owner, and not for the

(a) Cited 2 Parsons on Maritime Law 388, where much learning on the subject is collected.

underwriters; and that the underwriters to whom the ship had been abandoned were not entitled to any benefit from the freight so received. Upon the other point, as to what are the relative rights of *the parties in the event of the ship being so damaged by a [*795 peril insured against as not to be able to proceed upon the voyage except at an expense for repair exceeding her value when repaired together with the freight, I would refer to what is said by Parke, B., in *Worms v. Storey*, 11 Exch. 427. There, a vessel receiving considerable damage in the course of the voyage, the master, without repairing her, as he might have done, proceeded with her in an unseaworthy state, and a large quantity of the plaintiff's goods were necessarily thrown overboard; and it was held, that, having elected not to repair the vessel, the owner was liable for proceeding on the voyage with his vessel in an unseaworthy state. The charter-party contained an exception of "all unavoidable hindrances, dangers and accidents of the sea." Parke, B., said: "Under a charter-party containing such an exception, if the vessel sails in a seaworthy state, and in the course of the voyage is damaged by perils of the sea, the owner is not bound to repair it: but, if he does not choose to repair, he ought not to go to sea with the vessel in an unseaworthy state, and so cause the loss of the cargo. He ought either to repair or stop." That being the ordinary contract of affreightment, the policy must be taken to be made in reference to it. Where the vessel is rendered incapable by a peril insured against from proceeding on the voyage, I see no reason why the owner of the goods should intervene in order to prevent loss to the underwriter. I do not see why he should not treat it as a total loss. Say the goods are worth 5000*l.*, and the freight to Buenos Ayres was 1000*l.*, of which 250*l.* had been pre-paid; and suppose it would cost 3000*l.* to put the vessel in a condition to prosecute the voyage, and when repaired her value would be 2000*l.*, and no other vessel could be found at the port where she then was to take the goods on to *Buenos Ayres except at a [*796 cost of 1500*l.* Under these circumstances, it would not be to the interest of the shipowner, or of the master as representing him, to repair the ship or to forward the goods. The owner of the goods, however, has lost the 250*l.* advanced, and further he has lost 500*l.* on the whole transaction. That clearly would be a case of total loss, and such as might be proved under a declaration such as this. The seventh plea is clearly a bad one.

BYLES, J.—I am of the same opinion. It is plain, upon the authority of *Moss v. Smith*, 9 C. B. 94 (E. C. L. R. vol. 67), that this declaration sufficiently alleges that which amounts to a total loss of the pre-paid freight. Whatever, therefore, be the master's right or duty under the circumstances, it is distinctly averred that it was practically impossible to carry the goods on in the *Richmond*, and therefore the master was compelled to abandon the voyage. The owner of the goods repossessed himself of them, and carried them to their destination in another vessel, paying a higher rate of freight. He cannot sue the shipowner for the pre-paid freight. He has lost it by a peril insured against. Upon that ground, therefore, I agree with the rest of the court in thinking that the plaintiff is entitled to judgment. As to the seventh plea, however seaworthy the *Boa Fe*

might have been, the pre-paid freight would be lost. That plea, therefore, is clearly bad. Judgment for the plaintiff. (a)

(a) The rule was drawn up,—“That the general demurrer to the whole declaration be restored, and that judgment be entered for the plaintiff upon the said demurrers respectively,” that is, to the declaration and to the seventh plea.

The extent of the liability of insurers of freight, where the voyage has been abandoned, was very ably and fully discussed in the case of *Thwing v. Washington Ins. Co.*, 10 Gray 443, and the conclusion arrived at virtually in accordance with the case in the text; that where the sale of a ship becomes necessary at an intermediate port in consequence of damages sustained by perils insured against, the owner is entitled to abandon, and claim for a total loss of freight, and that notwithstanding the cargo may be carried to its destination in another vessel for a price equal to the freight which would have been paid had the original ship completed her voyage; Bigelow, J., in his opinion, saying, “that although it may be the *duty* of the master to forward the cargo after the loss of the vessel, where it can be done for the same or even a greater freight than the original charter-party called for, such action of the master shall not deprive the owners of their claim against the insurers for a total loss of freight, the subsequent freight not being the freight insured.”

It had previously been held in *Lord v. The Neptune Ins. Co.*, 10 Gray 109, that where a vessel is lost at an intermediate port by one of the perils insured against, the power of earning freight is gone, and the insurer is liable on his contract; and in such a case if the master sends forward the cargo at a cost exceeding the original freight, he will be presumed to be acting for the benefit of the shippers.

In order to sustain an action on a policy for a total loss of freight, it is requisite to prove that the ship was

disabled by the perils insured against, and that the cargo could not be carried to the port of destination from the port of necessity for one half the freight valued in the policy: *Whitney v. New York Fireman's Ins. Co.*, 18 Johns. 210; 4 Wend. 53. It is a constructive total loss if the vessel cannot be repaired at the port of necessity for less than half her value, and in such case the owner is entitled to abandon, and the insurers become liable for a total loss of freight: *Coolidge v. Gloucester Ins. Co.*, 15 Mass. 341. Where, however, part of the prescribed voyage has been performed before the happening of the peril insured against, and the cargo remains in *specie*, so that it can be sent forward to the port of destination at a cost less than a moiety of the stipulated freight, no total loss is occasioned.

As to the question of how far it is the *duty* of the master to forward the cargo, where the original ship is lost at an intermediate port by a peril insured against; the current of authority seems to sustain the rule laid down in *Lemont v. Lord*, 52 Me. 365. That it is a *duty* which the master owes to the owners, in the first place, to forward the cargo if anything can be saved as freight for them, and in case there cannot, it becomes his *duty* to the shippers as *their* agent, whenever such forwarding promises to be reasonably for their interest.

In a case in New York (*Kinsman v. The New York Ins. Co.*, 5 Bosw. 460), the rule was fully sustained as far as regards the owners, the court holding that the master was bound in duty to earn freight by forwarding the cargo, notwithstanding a constructive loss.

***RICHARD ARCHER WALLINGTON, Appellant; EMILY WILLES, Respondent. June 2. [*797**

The 69th section of the Public Health Act, 1848, gives the local board of health power to recover in a summary manner from the owners of the frontage their respective proportions of the expenses legally incurred by the board in sewerage, levelling, paving, &c., the street: and the 62d section of the Local Government Act, 1858, provides that these expenses may be recovered from the person who is the owner of such premises when the works are completed for which such expenses have been incurred, and *shall bear interest at the rate of 5 per cent. per annum till payment.* The 120th section of the Public Health Act, 1848, gave an appeal to the general board of health against the decision of the local board in respect of these expenses, and empowered the general board to make "such order in the matter as to them may seem equitable," and declared that "the order so made shall be binding and conclusive upon the said local board:" and the 65th section of the Local Government Act, 1858, enacts that memorials under the 120th section of the former act shall be addressed to one of the secretaries of state, "who shall have the same powers in respect thereof as are vested in the general board of health by the said section:—"

Held, that the award of the home secretary under this last-mentioned provision is conclusive as to the amount due as well for interest as for principal, though no mention is made therein of interest.

But, *semble*, that no interest is payable unless the amount really due from the party for his proportion of the expense of the works has been demanded.

Therefore, where the award of the home secretary was for a smaller sum than that demanded by the board, and professed to be for a given sum "in full of all demands,"—Held, that the award was conclusive, and the board were not entitled to interest up to that time.

THIS was a case stated under the 20 & 21 Vict. c. 43, for obtaining the opinion of the court on questions of law which arose in the exercise of the justices' summary jurisdiction, under the Public Health Act, 1848 (11 & 12 Vict. c. 48), and the Local Government Act, 1858 (21 & 22 Vict. c. 98), on the hearing of the information or complaint for recovery of the sum of 679*l.* 7*s.* 1*d.*, the respondent's proportion of making two streets in the district of Leamington, in the county of Warwick, and the sum of 137*l.* 8*s.* 11*d.*, interest thereon. The following are the circumstances of the case:—

1. In the year 1852, the parish of Leamington was by a provisional order of the general board of health, confirmed and made absolute by the Public Health Supplemental Act, 1852 (No. 2), 15 & 16 Vict. c. 69, created a district for the purposes of the Public Health Act, 1848; and the said Public Health Act, with the exception of s. 50, was applied to and put in force within the said district.

2. By s. 69 of the Public Health Act, 1848, it is *enacted, [*798 that, "In case any present or future street, or any part thereof (not being a highway), be not sewered, levelled, paved, flagged, and channelled to the satisfaction of the local board of health, such board may, by notice in writing to the respective owners or occupiers of the premises fronting, adjoining, or abutting upon such parts thereof as may require to be sewered, levelled, paved, flagged, or channelled, require them to sewer, level, pave, flag, or channel the same within a time to be specified in such notice; and, if such notice be not complied with, the said local board may, if they shall think fit, execute the works mentioned or referred to therein; and the expenses incurred by them in so doing shall be paid by the owners in default, according to the frontage of their respective premises, and in such proportions as shall be settled by the surveyor, or, in case of dispute, as shall be settled by arbitration (having regard to all the circumstances

of the case) in the manner provided by this act ; (a) and such expenses may be recovered from the last-mentioned owners in a summary manner, or the same may be declared by order of the said local board to be private improvement expenses, and be recoverable as such in the manner hereinafter (b) provided."

3. The Local Government Act, 1858, took effect, in the said district of Leamington, from the 1st of September, 1858.

4. By s. 38 of this act, it is enacted, that, "the powers given to local boards of health by the 69th and 70th sections of the Public Health Act, 1848, to compel the sewerage, levelling, paving, flagging, and channelling of streets that are not highways repairable at the public expense, and after the completion of such works to declare such *799] streets and highways repairable *at the public expense, shall extend to providing the means of lighting, metalling, or making good such streets, and may be exercised in respect of the carriage-way, foot-way, or any part of such streets; and the said powers shall be deemed to have extended, and shall extend and be exercised, in respect of any street or road of which a part was at the time of the application of the Public Health Act, 1848, or is or may be a public footpath or repairable at the public expense, as fully as if the whole of such street or road had been or was a highway not repairable at the public expense."

5. By s. 62 of the Local Government Act, 1858, it is enacted, that, "where the local board have incurred expenses for the repayment whereof the owner of the premises for or in respect of which the same are incurred is made liable either by application of or agreement with the owner, or by the Public Health Act, 1848, or any act incorporated therewith, or this act, the same may be recovered from the person who is owner of such premises when the works are completed for which such expenses have been incurred, in the manner provided by the Public Health Act, 1848; and such expenses shall be a charge on the premises in respect of which they were incurred, and shall bear interest at the rate of 5l. per centum per annum till payment thereof. In all summary proceedings by a local board for the recovery of expenses incurred by them in works of private improvement, the time within which such proceedings may be taken shall be reckoned from the date of the service of notice of demand."

6. By s. 120 of the Public Health Act, 1848, it is enacted, that, "if, in any case in which the local board are empowered to recover any expenses incurred by them in a summary manner, or to declare *800] such *expenses to be private improvement expenses, any person shall deem himself to be aggrieved by the decision of the said local board thereupon, he may within seven days after notice of such decision, address a memorial to the said general board, stating the grounds of his complaint; and the said general board may make such order in the matter as to them may seem equitable; and the order so made shall be binding and conclusive upon the said local board: and, if the said local board shall have proceeded to recover such expenses in a summary manner, the said general board may, if they shall think fit, direct the said local board to pay to the person so

(a) See Bayley, app., Wilkinson, resp., antè, p. 161.

(b) Section 146.

proceeded against such sum as they may consider to be a just compensation for the loss, damage, or grievance thereby sustained by him."

By s. 65 of the Local Government Act, 1858, it is enacted, that "memorials under the 120th section of the Public Health Act, 1848, from and after the 1st of September, 1858, shall be addressed to one of Her Majesty's principal secretaries of state, who shall have the same powers in respect thereof as are vested in the general board of health by the said section."

8. And by s. 81 of the same act, it is enacted, that "all orders made by one of Her Majesty's principal secretaries of state in pursuance of this act shall be binding and conclusive in respect of the matters to which they refer; and any such secretary may make orders as to the costs of any appeal to him under this act, and the parties by whom such costs are to be borne; and every such order may be made a rule of one of the superior courts of law, on the application of any party named therein."

9. On the 21st of September, 1858, two streets within the district of Leamington, called respectively Russell Terrace and Farley Street, and which were not at the time highways within the meaning of the *said 69th section of the Public Health Act, 1848, were not [*801 sewered, levelled, paved, flagged, channelled, metalled, and made good to the satisfaction of the local board of health for the said district. Thereupon the local board, by notices in writing to all the owners within the meaning of the said act of the premises fronting, adjoining, or abutting upon the whole of the said streets respectively, required them respectively within one calendar month from the service thereof to sewer, level, pave, flag, channel, metal, and make good so much of the said streets respectively as their said premises respectively fronted or adjoined to or abutted upon. Such notices were not complied with by any of the said owners; and the local board thereupon executed the works mentioned or referred to in the said notices respectively, and incurred certain expenses in so doing.

10. The respondent was and is the owner of certain lands abutting upon the said street called Russell Terrace, and also of certain other lands abutting upon the said street called Farley Street; and the proportion of the respective expenses, calculated according to the frontage of her said lands respectively, and settled by the surveyor under the said Public Health Act, 1848, as due from her, was 64*l.* 12*s.* 3*d.* in respect of her lands abutting on Russell Terrace, and 92*l.* 2*s.* 6*d.* in respect of her lands abutting on Farley Street, making a total of 734*l.* 14*s.* 9*d.*

11. The local board have not at any time declared the said expenses to be private improvement expenses, within the meaning of the Public Health Act, 1848.

12. On the 21st of December, 1859, payment of the sum of 734*l.* 14*s.* 9*d.*, being the aggregate of the above-mentioned proportions, with interest to that day, was duly demanded by the said local board of the said respondent. On the 26th of December, 1859, the [*802 *respondent duly addressed to the Right Hon. Sir G. C. Lewis, Bart., the then secretary of state for the home department, a memorial under the 120th section of the Public Health act, 1848, and the 65th

payable under a different act or different clause. I offered to produce the act, and to read it to Mr. Rawlinson. He said there was no necessity for that; for, he knew the clause. I objected to his taking any notice of the question of interest." And, on cross-examination, Mr. Wallington said: "I have received a letter from Mr. Taylor, secretary to the local government act office, about the interest, which I *806] object to produce. *I believe Mr. Locke inquired whether Mr. Taylor could not be written to; and I said I knew what Mr. Taylor's opinion was."

John Harris, being sworn, said: "I am sub-clerk to the local board. I was present on the inquiry held by Mr. Rawlinson, and heard something take place as to the question of interest. Mr. Baker asked what was the amount of the whole claim, and of the interest. Mr. Wallington objected to state the amount of the interest, as it was not part of the claim before Mr. Rawlinson, and said it was claimed under a separate clause of the act, and was going to read the act, but Mr. Rawlinson said he knew the clause. I mean the 62d clause of the Local Government Act."

21. After hearing the case, the justices considered the order of the secretary of state was conclusive upon them; and ordered that payment of 679*l.* 7*s.* 1*d.* be made by Mrs. Willes to the said local board, in full of all demands in respect of the matters set forth in the information. .

The questions for the opinion of the court were,—first, whether the decision was or was not right in point of law,—secondly, if the local board were entitled to any interest in addition to the sum awarded by the secretary of state, from what day or time, and on what sum, was such interest claimable.

If the decision was right, the order as made was to stand: if not, the court was requested to remit the matter to the justices in order that they might make a proper order in accordance with their decision.

Horace Lloyd, for the appellant.(a)—The question turns mainly on the *807] 62d section of the Local *Government Act, 1858, which provides, that, "where the local board have incurred expenses for the repayment whereof the owner of the premises for or in respect of which the same are incurred is made liable, either by application of or agreement with the owner, or by the Public Health Act, 1848, or any act incorporated therewith, or this act, the same may be re-

(a) The points marked for argument on the part of the appellants were as follows:—

"1. That the decision of the justices was wrong in point of law; and that the local board of health were entitled to recover interest in addition to the sum of 679*l.* 7*s.* 1*d.* awarded by the secretary of state, as mentioned in the case:

"2. That the powers given to the secretary of state upon a memorial to him under the provisions of s. 120 of the Public Health Act, 1848 (11 & 12 Vict. c. 63), and of s. 65 of the Local Government Act, 1858 (21 & 22 Vict. c. 98), extend only to the decision of the local board upon the amount of the expenses or other matter within the jurisdiction of the local board, which interest is not:

"3. That the right to interest is given by a separate and subsequent enactment, s. 62 of the Local Government Act, 1858; and that the obligation to pay such interest is a fresh statutory duty:

"4. That such interest began to run from the time when the expenses first became due and were demanded, i. e. on the 21st of December, 1859, or, at any rate, from the time of the demand of the reduced amount, in February, 1860; and that such interest continues and will continue to run until payment."

covered from the person who is owner of such premises when the works are completed for which such expenses have been incurred, in the manner provided by the Public Health Act, 1848 [s. 129], and such expenses shall be a charge on the premises in respect of which they were incurred; *and shall bear interest at the rate of 5l. per centum per annum till payment thereof.*" By the 120th section of the Public Health Act, 1848, an appeal to the general board of health was given to any party aggrieved by proceedings of the local board as to the recovery of expenses; and the general board were empowered to make such order in the matter as to them *might seem equitable, and the order so made was to be binding and conclusive [*808 upon the said local board. Now by the 65th section of the Local Government Act, 1858, this appeal is to be by memorial addressed to one of Her Majesty's principal secretaries of state, "who shall have the same powers in respect thereof as are vested in the general board of health by the said section:" and the 81st section of the same act provides that "all orders made by one of Her Majesty's principal secretaries of state in pursuance of this act shall be binding and conclusive in respect of the matters to which they refer; and any such secretary may make orders as to the costs of any appeal to him under this act, and the parties by whom such costs are to be borne; and every such order may be made a rule of one of the superior courts of law, on the application of any party named therein." The respondent and others having been called upon to sewer, level, pave, &c., certain streets upon which their premises abutted, and having omitted to comply with the notice, the necessary works were done by the local board, and the expenses incurred were apportioned by the surveyor, and 734l. 14s. 9d. was demanded from the respondent on the 21st of December, 1859. The respondent thereupon presented a memorial of appeal under the 65th section of the Local Government Act. The local board reconsidered the matter, and reduced their demand to 705l. 9s. 9d., and gave notice thereof to the respondent on the 21st of December, 1859. Within seven days after the receipt of this notice, the respondent addressed a second memorial to the secretary of state. An inquiry was thereupon had, and he on the 20th of November, 1863, made an order that the respondent should pay the local board 679l. 7s. 1d., "in full of all demands:" and that sum was tendered by her on the 17th of December. The question now is, *whether the award of the home secretary precludes the local board from recovering interest from the time of their amended [*809 demand on the 21st of December, 1859. On the part of the respondent, the contention is that the award of Sir George Grey of the 679l. 7s. 1d. "in full of all demands," covers the interest up to that time. On the other hand, it is submitted on behalf of the local board that Sir George Grey only had power to deal with that which was referred to him, viz. the amount of the principal. If the order includes interest up to that time, the board will be receiving compound interest in respect of any subsequent delay in payment. Suppose the damages recovered in an action are reduced on motion, the interest is allowed on the reduced amount from the time of the verdict. (a) [ERLE, C.

(a) The 1 & 2 Vict. c. 110, s. 17, gives interest only from the time of entering up judgment.

J.—We do not sit in judgment on the award of the home secretary. The sum he has awarded is the sum that is due.] His award is only of the amount due for principal. The 69th section of the Public Health Act, 1848, creates the liability: and the 62d section of the Local Government Act, 1858, gives the interest. The liability is incurred when the expenses are incurred; and the interest must run from the same period, though the amount may be subsequently varied. [BYLES, J.—The amount must be liquidated and settled so as to be in the nature of a mortgage.] No doubt. It is the duty of the frontagers to do the work themselves, upon receiving notice. They are in default if they neglect to do it: and, if the local board do it, there is no hardship in the adjoining owners being called upon to pay interest from the moment their liability is ascertained. All that the home secretary could deal with upon the appeal to him, was, *810] the amount of the expenses and the *apportionment. [BYLES, J.—If, as you contend, the interest ran from the time the expenses were incurred, the respondent never could stop its currency until the decision of the home secretary was made known.] Interest is not in the nature of a penalty. The theory is, that the money in the hands of the respondent is worth 5 per cent. [BYLES, J.—Then she is to pay 5 per cent. whether she makes it or not. The local board called upon her to pay a sum which it turns out they were not warranted in demanding. There has been no demand of the proper sum. Why is she to pay interest, when she tendered the proper amount in a reasonable time after it was ascertained?] The same argument might equally be urged when a judgment is appealed against. [ERLE, C. J.—This power of entertaining an appeal against the apportionment of the expenses is given to the home secretary after the legislature had had the provision as to interest immediately under their contemplation.]

Markby, for the respondent.(a)—The award of the home secretary is conclusive as to the amount due. Interest can only be looked upon as a penalty for the non-performance of a duty. A party can never be liable to damages until default: and here the respondent was guilty of none, inasmuch as the amount really due (which she was always ready to pay) was never demanded.

*811] ERLE, C. J.—It appears to me that Mr. Markby has *put forward a principle which most likely would prevail whenever that precise point shall be raised for our decision. Upon the other point, however, I entertain a clear opinion in favour of the respondent. The 69th section of the Public Health Act, 1848, gives the local board of health power to recover in a summary manner from the owners of the frontage their respective proportions of the expenses legally incurred by the board in sewerage, levelling, paving, &c., the street: and the 62d section of the Local Government Act, 1858, provides that these expenses may be recovered from the person who is the owner of such premises when the works are completed for which such expenses have been incurred, and shall bear interest at

(a) The points marked for argument on the part of the respondent were as follows:—

“1. That the justices had no jurisdiction to entertain this question:

“2. That the sum awarded by the secretary of state having been awarded in ‘full of all demands,’ interest cannot now be claimed by the local board.”

the rate of 5 per cent. per annum till payment thereof. The 120th section of the Public Health Act, 1848, gave an appeal to the general board of health against the decision of the local board in respect of these expenses, and empowered the general board to make "such order in the matter as to them may seem equitable," and declared that "the order so made shall be binding and conclusive upon the said local board." Then the 65th section of the Local Government Act, 1858, enacts that memorials under the 120th section of the former act shall be addressed to one of the secretaries of state, "who shall have the same powers in respect thereof as are vested in the general board of health by the said section." I think, that, as that power of appeal to the secretary of state is created after the section giving the summary remedy for the principal, and after the section giving interest thereon till payment, it was intended that the secretary of state should have power to make an order which should be binding and conclusive upon the local board in respect both of principal and interest. In this case, Sir George Grey, as it appears to me, has in effect said by his award, the amount due for *principal and interest is, 679*l.* 7*s.* 1*d.* I think the very wide provision of the statute makes that award [*812 binding and conclusive upon the local board from the time it was made. It appears that Mrs. Willes was ready from that time to pay what was due. I therefore think the decision of the justices should be affirmed. When the proper time comes for deciding that question, I think I should incline to assent to Mr. Markby's proposition, that the interest is given by way of penalty for the party's default in performance of a duty. It seems to me to be founded in good sense, and that in justice no interest should be due until the amount for which the party is legally liable has been settled and ascertained, and duly demanded. I do not, however, rest my decision upon that point. I am very clear upon the second point, viz. that the award of Sir George Grey has decided the matter.

WILLIAMS, J., and WILLES, J., concurred.

BYLES, J.—I should be content to rest entirely on the point urged by Mr. Markby, that interest is given as a sort of penalty for the breach of duty on the part of the respondent. But upon the other point also I entirely agree with what has fallen from my Lord.

Lloyd submitted, that, inasmuch as the tender was not made until a month after Sir George Grey's award, and therefore the local board were at all events entitled to a month's interest, they should not be visited with costs.

BYLES, J.—There was no unreasonable delay. The decision must be affirmed with costs.

Decision affirmed, with costs.

***813]** ***THELWALL v. YELVERTON.** *May 23.*

1. An Irish judgment for a debt contracted in England does not constitute a "cause of action which arose within the jurisdiction" of the superior courts of this country, within the meaning of the 18th section of the Common Law Procedure Act, 1852; nor does its remaining unsatisfied, the debtor being in this country, constitute "a breach of a contract made within the jurisdiction."

2. A. sued B. in Ireland for a debt alleged to have been contracted at Hull, and obtained a judgment for 259*l.* 17*s.* 3*d.* debt, and 470*l.* 14*s.* 11*d.* costs. B. having gone abroad, A. sued out a writ against him for service out of the jurisdiction, under the 15 & 16 Vict. c. 76, s. 18, endorsed for 730*l.* 12*s.* 2*d.*, and 10*l.* for costs, and, upon affidavits that B. was justly and truly indebted to him in the sum of 730*l.* 12*s.* 2*d.* "upon and by virtue of the judgment recovered in Ireland," that "the sum of 259*l.* 17*s.* 3*d.*, part of the sum recovered by the said judgment, was a debt contracted by B. at Hull, and the sum of 470*l.* 14*s.* 11*d.*, the residue of the sum of 730*l.* 12*s.* 2*d.* so recovered, was for his costs of suit in that behalf," and that B. was personally served with the writ in Paris,—obtained an order to proceed, and filed a declaration and particulars of demand claiming the whole 730*l.* 12*s.* 2*d.* "upon and by virtue of the judgment" obtained against B.:—The court, upon an affidavit of B. that he was never served with the writ, and that, at the time of the alleged service, and for some time before and since, he was residing upwards of 200 miles from Paris, set aside the service, the order, and the subsequent proceedings, on the ground that there had been no service of the writ, and that the affidavits disclosed that A. was proceeding for a cause of action which did not arise within the jurisdiction of the English courts.

3. *Quære*, whether the order would have been good if it had been limited to the original cause of action alleged to have arisen at Hull?

IN the year 1859, the plaintiff brought an action in the Court of Common Pleas in Ireland against the defendant, Major Yelverton, to recover the sum of 259*l.* 17*s.* 3*d.*, for board, lodging, medical attendance, and necessaries supplied to a lady who was alleged to be the defendant's wife. The cause was tried before Monahan, C. J., at the sittings after Hilary Term, 1860. The substantial question was whether or not the lady was the defendant's wife. The plaintiff relied upon the fact of the performance of two ceremonies of marriage between the defendant and Maria Theresa Longworth, one of which took place in Scotland, and which the plaintiff contended to be binding by the law of Scotland; the other performed in Ireland, by a Roman Catholic clergyman. The defendant insisted that no such contract was entered into as by the law of Scotland would suffice to constitute a legal marriage; and, further, that, as regarded the alleged Irish marriage, even though that might have been valid at common law prior to the passing of the Irish Marriage Act, 19 G. 2,
***814]** c. 13, the ceremony was invalid, on the *ground that Major Yelverton, within twelve months next before it took place, was, or had professed himself to be, a Protestant. A verdict was found for the plaintiff in that action, for the amount claimed.

Exceptions were tendered to the ruling of the Chief Justice on that trial; and these came on to be argued before Monahan, C. J., Ball, J., Keogh, J., and Christian, J., and were disallowed, the learned judges being equally divided in opinion,—Monahan, C. J., and Ball, J., holding that there was evidence from which a jury might infer that the defendant had been a Roman Catholic throughout the entire period of twelve months before the (Irish) marriage, so as to take the case out of the operation of the 19 G. 2, c. 13; that statute having reference to actual religious belief, and not merely nominal profession: and Keogh, J., and Christian, J., holding that, notwithstanding the

evidence relied on by the plaintiff, the learned judge was bound to tell the jury that the defendant had not ceased during the period in question to profess the Protestant religion, within the meaning of the statute, and that the marriage was void in law: see *Thelwall v. Yelverton*, 14 Irish Common Law Rep. 188.

The plaintiff accordingly had judgment in that action for debt and costs amounting together to 730*l.* 12*s.* 2*d.*

In the year 1863, the plaintiff issued a writ out of the Court of Exchequer in England against the defendant, but it was found impossible to effect service of it, he being out of the country. That proceeding was consequently abandoned, and a writ issued out of the Court of Common Pleas (in England), dated the 27th of November, 1863, and endorsed for service out of the jurisdiction.^(a) By the endorsement on this latter *writ, the plaintiff claimed 730*l.* 12*s.* [*815 2*d.* for debt, and 10*l.* for costs.

In Hilary Term last the plaintiff applied to this court for leave to proceed without personal service of the declaration. He founded his application upon affidavits which alleged that the defendant was residing abroad in order to avoid process, and that he had been personally served with the writ in this action in *Paris, from whence he had immediately departed, and his present place of residence was unknown. The court thought that further attempts should be made to discover the defendant's residence; and the motion was refused.

On the fourth of February last, a fresh application was made to Keating, J., at Chambers, for leave to file a declaration. The affidavits in support of that application, besides swearing to personal service of the writ upon the defendant, in Paris, contained amongst others the following allegations,—

“The Hon. Charles William Yelverton, the defendant, in this action, is a British subject, and he is justly and truly indebted to me (the plaintiff) in the sum of 730*l.* 12*s.* 2*d.*, the amount endorsed on the writ in this action, upon and by virtue of a judgment recovered

(a) Under the 18th section of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), which enacts, that, “in case any defendant, being a British subject, is residing out of the jurisdiction of the said superior courts, in any place except in Scotland or Ireland, it shall be lawful for the plaintiff to issue a writ of summons in the form contained in the schedule A. to this act annexed, marked No. 2, which writ shall bear the endorsement contained in the said form, purporting that such writ is for service out of the jurisdiction of the said superior courts; and the time for appearance by the defendant to such writ shall be regulated by the distance from England of the place where the defendant is residing; and it shall be lawful for the court or judge, upon being satisfied by affidavit that there is a cause of action which arose within the jurisdiction, or in respect of the breach of a contract made within the jurisdiction, and that the writ was personally served upon the defendant, or that reasonable efforts were made to effect personal service thereof upon the defendant, and that it came to his knowledge, and either that the defendant wilfully neglects to appear to such writ, or that he is living out of the jurisdiction of the said courts in order to defeat and delay his creditors, to direct from time to time that the plaintiff shall be at liberty to proceed in the action, in such manner, and subject to such conditions, as to such court or judge may seem fit, having regard to the time allowed for the defendant to appear being reasonable, and to the other circumstances of the case: Provided always that the plaintiff shall, and he is hereby required to, prove the amount of the debt or damages claimed by him in such action, either before a jury upon a writ of inquiry, or before one of the Masters of the said superior courts, in the manner hereinafter [s. 94] provided, according to the nature of the case, as such court or judge may direct; and the making such proof shall be a condition precedent to his obtaining judgment.”

in Her Majesty's Court of Common Pleas in Ireland by me against the said defendant, for the said sum of 730*l.* 12*s.* 2*d.*, an office-copy of which judgment is now produced to me:

"The sum of 259*l.* 17*s.* 3*d.*, part of the said sum recovered by the said judgment, was a debt contracted by the defendant for necessities supplied by me to his wife at Hull aforesaid, and the sum of 470*l.* 14*s.* 11*d.*, the residue of the sum of 730*l.* 12*s.* 2*d.* so recovered, was for my costs of suit in that behalf, and assessed to me by the said court:

"The defendant is residing abroad in order to defeat and delay me in the recovery of my said debt; and every endeavour has been made by me and my agents employed for the express purpose to discover the said defendant, but the same have been unsuccessful, owing to the said defendant having secretly left England, and so baffled all search after him until he was traced in Paris:

*817] "The defendant is prosecuting an appeal in the *House of Lords,^(a) in the prosecution of which appeal Messrs. Tippetts & Son, of Size Lane, in the city of London, act as his agents, and Messrs. Lang & Adam, of Edinburgh, as his solicitors; but both firms, on being applied to, have evaded, and in fact refused, to accept service of the writ in this action, or to discover or make known the defendant's address; and it was only recently discovered that the defendant was resident in Paris, in the empire of France, where he in fact has resided for some time past, and still resides, as I am informed and believe, and at which place he has been personally served with the writ in this action, as appears by the affidavit of the service thereof, sworn by J. R. Gentow, and now produced to me:

"The sum of 730*l.* 12*s.* 2*d.* is still due and owing to me from the said defendant."

Keating, J., thereupon made the following order,—“That the plaintiff be at liberty to proceed in this action by filing a declaration against the defendant; that he do serve a notice requiring the defendant to plead to the said declaration in sixteen days, with particulars of the plaintiff's demand, and a copy of this order; and that, in default of the defendant pleading within the said sixteen days, the plaintiff be at liberty to prove the debt before one of the Masters, by affidavit or otherwise as the Master shall think fit, and to sign final judgment for the amount so found due by the Master.”

The plaintiff thereupon filed the following declaration, notice to plead, and particulars of demand:—

*818] “For that the plaintiff, on the 12th of November, *1862, in the Queen's Court of Common Pleas in Ireland, by the judgment of the said court recovered against the defendant 259*l.* 17*s.* 3*d.*, together with 470*l.* 14*s.* 11*d.* for costs of his suit in that behalf, which said judgment is still in force and unsatisfied: and the plaintiff claims 1000*l.*”

“Take notice, the defendant is required to plead to the within declaration in sixteen days, and, in default of pleading within that period, the plaintiff will be at liberty to prove his debt before one of the Masters of this court, by affidavit or otherwise as the Master shall

(a) On appeal against the decision of the Court of Session in Scotland affirming the validity of the Scotch marriage. See *Yelverton v. Longworth*, 11 *Law Times*, N. S. 118, the decision of the Lords reversing the judgment of the Court of Session.

think fit, and sign final judgment for the amount to be so found due by the Master."

"This action is brought to recover the sum of 730*l.* 12*s.* 2*d.* upon and by virtue of a judgment bearing date the 12th of November, 1862, obtained against you, the above-named plaintiff, in Her Majesty's Court of Common Pleas in Ireland, together with interest at the rate of 4 per cent. per annum from the said 12th of November, 1862, until payment."

Montague Smith, Q. C., in Easter term last, obtained a rule nisi to set aside the writ of summons, and the alleged service of a copy thereof, and the order of Keating, J., and all subsequent proceedings, on the grounds that Major Yelverton was not a domiciled Englishman,—so held in the Divorce Court in *Yelverton v. Yelverton*, 1 Sw. & Trist. 574,—that there was no cause of action arising or breach of contract committed within the jurisdiction of this court, and that the statement that the major was served with the writ in Paris was false. The affidavit of the defendant (upon which, amongst others, the rule was moved) stated that he was not in Paris, nor within two hundred miles thereof, during any part of the months of December, 1863, and January and February, 1864, *but that during the whole of [*819 that period, he was residing more than two hundred miles from Paris; and that he was not on the 2d of January, 1864, or at any other time, at Paris or elsewhere, personally served with a true copy or any copy of a writ of summons issued out of this court at the suit of the plaintiff, dated the 27th of November, 1863, or with any copy of a writ of summons or a writ of summons issued out of this court.

Keane, Q. C., and *Downing Bruce*, now showed cause.—The circumstances of this case are somewhat peculiar. The defendant had twice gone through the ceremony of marriage with a lady named Longworth. He afterwards deserted her, and (she being at Hull, in England) the plaintiff furnished her with necessary maintenance. The defendant being in Ireland, the plaintiff sued him there, and obtained a verdict and judgment against him, which judgment stands unimpeached. This Irish judgment being founded upon a contract made in England constitutes, it is submitted, a cause of action here. The debt for which the verdict was obtained was 259*l.* 17*s.* 3*d.*; the costs are 470*l.* 14*s.* 11*d.* As to the latter, there may perhaps be a difficulty in saying that they constituted a cause of action arising here: but the foundation of the whole proceeding is a contract and a breach here. [WILLIAMS, J.—It may be that the foreign judgment does not merge the original cause of action. But the plaintiff is not suing here upon the original cause of action. He is suing upon the judgment.] It will be enough if the plaintiff establishes a debt of 259*l.* 17*s.* 3*d.* If the plaintiff once gets an appearance,—which, according to *Forbes v. Smith*, 10 Exch. 717, cures any irregularity, and gives the court jurisdiction,—he may declare on either. There is no irregularity in the writ: and the plaintiff *is not compelled by [*820 the form of it to declare upon the Irish judgment. [WILLES, J., referred to *Binet v. Picot*, 4 Hurlst. & N. 365, where it was held that a writ issued in pursuance of the 18th section of the Common Law Procedure Act, 1852, for service, and served, on a British subject out

of the jurisdiction, may be set aside on the application of the defendant, if it is shown that there was no cause of action which arose within the jurisdiction.] That which took place at Hull sufficiently founds the jurisdiction: and the proceedings in Ireland do not affect it. The defendant was in London after the judgment was obtained. The promise follows him. [WILLES, J.—To obtain an order to proceed, you must satisfy the judge that you are going for the 259*l.* 17*s.* 3*d.*, and for that only.] The particulars show that the plaintiff is going for the Irish judgment. But these and the declaration may be amended. Then, the personal service is distinctly and unequivocally sworn to: and the defendant's denial is not corroborated. He alleges that he was not in Paris in the months of December, 1863, or January or February, 1864: but he does not say where he was.

Montague Smith, Q. C., and *W. A. Clarke*, in support of the rule.—It is plain that the plaintiff is proceeding upon the Irish judgment; and, if so, the case is not within the statute. [WILLES, J.—The affidavit is of the service of a writ the endorsement on which leaves out the Irish judgment.] The breach alleged in the declaration is, that the judgment remains unsatisfied. [WILLIAMS, J.—The plaintiff in his affidavit seems to rely upon the cause of action arising at Hull.] He merely states of what the judgment is composed. The declaration and particulars, which were delivered with the order, are founded upon the judgment only. This is an abuse of the process of the court. As to the *alleged service,—the affidavit of the process-server does not state that he knew Major Yelverton: and the Major swears positively that he was not served, and that he was not within two hundred miles of Paris at the time of the alleged service.

ERLE, C. J.—I am of opinion that this rule should be made absolute as to that part of it which seeks to set aside the alleged service of the writ and the subsequent proceedings, on the ground of the absence of personal service. It is clear upon the affidavits that there has been no personal service. I am also of opinion that the order of my Brother Keating should be set aside on the ground of the insufficiency of the affidavit upon which it was granted. The leave to proceed, which the judge is empowered by the 18th section of the Common Law Procedure Act, 1852, to give, is founded upon the condition that the judge shall be satisfied that there is a cause of action which arose within the jurisdiction, or a claim in respect of the breach of a contract made within the jurisdiction. Now, it is plain that the plaintiff here is proceeding on the Irish judgment. His affidavit states that the defendant is justly and truly indebted to him in the sum of 730*l.* 12*s.* 2*d.* “upon and by virtue of a judgment recovered in Her Majesty's Court of Common Pleas in Ireland by him against the said defendant, for the said sum of 730*l.* 12*s.* 2*d.*” An Irish judgment is not a cause of action arising within the jurisdiction of the superior courts of this country, nor is the non-payment of the amount thereof a breach of a contract made within the jurisdiction. The substance of the affidavit is,—I want an order for leave to proceed against the defendant in an action brought to recover the amount of a judgment which I have obtained against him in the Court of Common

Pleas in Ireland. An order founded upon *such an affidavit clearly will not do. It is true the next paragraph divides the amount,—“The sum of 259*l.* 17*s.* 3*d.*, part of the said sum recovered by the said judgment, was a debt contracted by the defendant for necessities supplied by me to his wife at Hull” (which would be a debt or cause of action arising within the jurisdiction), and the sum of 470*l.* 14*s.* 11*d.*, the residue of the sum of 730*l.* 12*s.* 2*d.* so recovered, was for my costs of suit in that behalf, and assessed to me by the said court.” It has been attempted to support the order, as if the plaintiff was claiming to proceed in respect of a breach of the contract for the board and lodging furnished to the defendant's wife only. But I think we cannot so take the affidavit, but must treat it as merely explanatory of the Irish judgment. I do not say that I would rest my judgment upon that. But still I think, that, where the plaintiff is proceeding against a person who is abroad, the court should be satisfied that he strictly shows what it is that he relies on. If the affidavit really contained a claim to proceed upon two different causes of action, one of which arose within the jurisdiction and the other did not, and the judge had had his attention drawn to that fact, he never would have given leave to proceed. An order made under such circumstances would, it seems to me, clearly be bad. It is seldom that any appearance is entered to writs under this section. If this order were enforced, the result would be that the plaintiff would go before the Master and claim the whole 730*l.* 12*s.* 2*d.*, and the Master would be obliged to allow the whole notwithstanding a large portion of it confessedly did not arise within the jurisdiction. I think the rule must be made absolute to set aside the alleged service of the writ, the order of my Brother Keating, and all subsequent proceedings.

WILLIAMS, J.—I am of the same opinion. The Irish *judgment clearly cannot be regarded as a cause of action arising within the jurisdiction of the superior courts in England. Nor can I adopt the subtle argument that the judgment-debtor by afterwards coming to this country is guilty of a breach of an implied contract within the jurisdiction. But it was urged by Mr. Keane, that, at all events, this is not like the case of an English judgment, where the original cause of action is merged; and that a foreign judgment cannot be pleaded in bar to an action for the same cause here, on the ground that the original cause of action is merged in the judgment. So far his argument is well founded. *Smith v. Nicolls*, 5 N. C. 208 (E. C. L. R. vol. 35), 7 Scott 147, and *The Bank of Australasia v. Harding*, 9 C. B. 661 (E. C. L. R. vol. 67), are authorities for that: and the cases of *Harris v. Saunders*, 4 B. & C. 411 (E. C. L. R. vol. 10), 6 D. & R. 471, and *Ferguson v. Mahon*, 11 Ad. & E. 179 (E. C. L. R. vol. 39), 3 P. & D. 143, seem to show that there is no difference between an Irish and a foreign judgment in this respect. Then the question arises, has the plaintiff proceeded here for the original cause of action? It appears to me that he has not. The affidavit is so framed that the learned judge might have been asked to give an order to proceed in respect of the cause of action arising in Hull. There might have been no objection to that. But here the plaintiff applied for and took an order founded upon the Irish judgment. Without, therefore, deciding whether or not, if the plaintiff had

elected to take an order limited to the original cause of action, such an order would have been unobjectionable, it is enough to say that this is an order for leave to proceed in an action upon the Irish judgment, and therefore that it is bad, and must be set aside in toto.

WILLES, J.—I am of the same opinion. My only doubt is, whether *824] the declaration should not be read, in order *to show what it was that the plaintiff was really suing for, and whether the writ itself should not be set aside. Probably the defendant's object will be attained by setting aside the alleged service, and the order for leave to proceed, and the subsequent proceedings.

BYLES, J.—I am of the same opinion. I concur with the rest of the court on the ground that I am not satisfied that the writ was ever served. Without meaning at all to dissent from what has been said by the other members of the court, I am unable to arrive at any other conclusion than that the person who swore that he personally served the writ upon Major Yelverton in Paris was mistaken.

Rule absolute to set aside the alleged service of the writ, the order of Keating, J., and all subsequent proceedings, with costs.

SPEEDING v. YOUNG and Another. *May 23.*

To make a defence available on the ground of the avoidance of circuity of action, the damages must necessarily be the same in character and amount.

The judge at nisi prius having refused to allow the defendant to add a plea of fraud, the court declined to interfere.

Costs of a witness whose testimony is rejected as irrelevant.

THIS was an action brought by the plaintiff, a licensed pilot, against the defendants, shipbuilders at Limehouse, to recover a sum of 42*l.* which the plaintiff alleged he had expended at the request of the defendants in raising an oyster-smack called the Robert and Elizabeth, which had been run down by a gun-boat called The Charger, in Limehouse Reach, on the 13th of September last, whilst the latter vessel was proceeding down the river under the pilotage of the plaintiff, on a *trip for the trial of a new steering-apparatus with *825] which she had been fitted in the defendants' dock.

The cause was tried before Byles, J., at the sittings at Westminster after last Hilary Term. The plaintiff swore distinctly that one of the defendants, on being informed of the accident, desired him to get the smack raised, and that, on the bill being shown to him, he promised to pay it. For the defence, it was suggested that the sinking of the smack was the result of negligence on the part of the plaintiff; and it was proposed, on cross-examination, to ask the plaintiff the circumstances under which she was run down. The plaintiff's counsel objected that it was not competent to the defendants to go into evidence of negligence, there being no plea upon the record to raise that question. The learned judge declined to admit the evidence, and refused to allow a plea to be added.

Mr. Young, who was called, denied that he had authorized the plaintiff to raise the oyster-smack, or promised to pay him the expenses he had incurred in so doing.

Upon this conflict of evidence the learned judge left the case to the jury, and they returned a verdict for the plaintiff.

Hawkins, Q. C., in Easter Term last, moved for a new trial, on the ground of the improper rejection of evidence, that the verdict was against evidence, and also on the ground of surprise. He submitted that the evidence of negligence ought to have been admitted, to avoid circuitry of action; for, if the plaintiff was employed by the defendants to pilot the *Charger*, and they sustained damage from the negligent performance of that duty, they might have sued him for that negligence. He further submitted that the defendants ought to have been allowed to add a plea of fraud; for *that they were in a condition to prove that they had been deceived by his improper [*826 concealment of the circumstances which occurred in relation to the accident. The alleged surprise was that a witness (a clerk in the employ of the defendants) who was vouched by the plaintiff as having been present at his interview with Mr. Sidney Young (and who would have contradicted his evidence) arrived too late,—the trial having in consequence of the learned judge's refusal to receive evidence of the plaintiff's negligence terminated earlier than was anticipated.

ERLE, C. J.—I am of opinion that there should be no rule in this case. As to the plea of fraud, I think it should have been put upon the record at an earlier stage, if fraud and concealment had been intended to be relied on as a defence. It is a species of answer which I always look upon with considerable hesitation. There was evidence on both sides, which no doubt went to the jury with proper remarks by the learned judge. As to the absence of the defendants' witness, I cannot think that any ground for granting a new trial. He was absent on speculation that the cause would occupy a longer time than it did. Common prudence would dictate to the attorney to have all his witnesses ready in court at the commencement of the proceeding: and the witness's absence is the less inexcusable in this case because he was a clerk in the employ of the defendants, and therefore more immediately under their own control.

WILLES, J.—I am of the same opinion. A defence is admitted in order to avoid circuitry of action only where the damages would necessarily be the same. Here, they would not be the same. That which the plaintiff goes for is a debt of 42*l*. The counter-claim set [*827 up by *the defendants would be for unliquidated damages. The nearest case laying down the law upon that subject in modern times is *Alston v. Herring*, 11 Exch. 822. I think the learned judge would have been wrong if he had admitted the proposed evidence. Then, the alleged surprise is on the very point whether or not a contract such as that relied on by the plaintiff was made. It is much too late now to fish out evidence which might have been brought forward before.

KEATING, J., concurring,

Rule refused.

Upon the taxation of costs, the plaintiff claimed to be entitled to the costs of witnesses who had been subpoenaed to show that the collision was occasioned by the defective nature of the steering-apparatus. These witnesses had not been called, in consequence of the ruling of the learned judge that the only issue was whether or not

the defendant made the promise as alleged. The Master refused to allow the costs of that evidence.

W. Williams moved for a rule calling upon the defendant to show cause why the Master should not be at liberty to review his taxation in this respect. He submitted that, conceding the general rule to be as laid down in *Galloway v. Keyworth*, 15 C. B. 228 (E. C. L. R. vol. 80), viz. that, where a witness is rejected at nisi prius, and the ruling of the judge is acquiesced in by the parties, or upheld by the court, the expenses of his attendance are not allowed on taxation as between party and party, yet this was an exceptional case, inasmuch as both parties went down to try the question whether or not the plaintiff had been guilty of negligence,—the defendants having examined two *828] witnesses upon *interrogatories to that point. [BYLES, J.—When Mr. Hawkins for the defendants, proposed to cross-examine the plaintiff as to negligence, Mr. Lush, who appeared for the plaintiff, strenuously objected that evidence of negligence was not admissible: and I so ruled.]

ERLE, C. J.—I am of opinion that the Master was right in his decision. The parties went down to try an issue which was decided by the judge to be whether or not the defendant made the contract declared on. As to this there was a conflict of evidence. We thought, when a new trial was moved for on the part of the defendant, that that was the issue. It appears, however, that both sides at one time considered that the relevant question was whether the plaintiff had exhibited a want of due skill as a pilot. But, giving my best consideration to the case, I find nothing to warrant the suggestion that that was the point at issue between the parties. I think, therefore, the costs of witnesses subpoenaed by the plaintiff to negative negligence on his part, were not properly costs which his opponent ought to be called upon to pay.

The rest of the court concurring,

Rule refused.

*829] *JACKSON v. HOPPERTON. May 23.

1. In an action for slander in giving a character of a servant, although the occasion *prima facie* justifies the communication of matter which would otherwise be actionable, yet if, at the close of the plaintiff's case, there is any evidence which would warrant the jury in inferring actual or express malice, the judge cannot withdraw the case from them.

2. Thus, where the defendant, in answer to an inquiry as to her character, charged the plaintiff with acts of dishonesty, having previously told her, that, if she would acknowledge having committed them, he would give her a character:—Held, that it was properly left to the jury to say whether the defendant *bona fide* believed the charge to be true, or was influenced by sinister or corrupt motives.

3. 60*l.* damages in an action of slander, where it was proved, that, in consequence of the speaking of the words, the plaintiff lost an employment worth 50*l.* a year, besides board, &c.,—Held, not excessive.

THIS was an action of slander. The declaration stated that the defendant was a man-milliner, that the plaintiff had been in his service and employ as a saleswoman and assistant, and that the defendant falsely and maliciously spoke and published of the plaintiff the following words,—“Miss Jackson is dishonest,” and alleged for special damage that certain persons carrying on business under the firm of Cap-

per & Co. had in consequence of the speaking of the words refused to employ the plaintiff.

The defendant pleaded not guilty.

The cause was tried before Williams, J., at the sittings in London after last Easter Term. The facts were as follows:—The plaintiff entered the service of the defendant as a shopwoman in December, 1862. Shortly afterwards the defendant accused her of stealing money from the till; saying that he missed a half-sovereign and two or three shillings, she being near, and having access to the till. The plaintiff denied having taken it, and nothing more was said of the matter. Subsequently, the use of the till was discontinued, and the money was kept in a desk which was locked, the defendant keeping the key. The plaintiff remained in the service of the defendant until the following October, when she left one Sunday evening in consequence of a disagreement with the defendant about her wishing to go out. During the week before she left, the defendant had accused her of stealing 3*l.* 10*s.* from the desk. The defendant, on going [*830 *upstairs to dinner, had left the key in the lock, and, during his absence from the shop, the plaintiff was seen by the defendant's daughter to come from the desk, and shortly afterwards the sum mentioned was said to have been missed from it. On the Monday after she left the defendant's service, she called to fetch away her clothes and to receive a balance of salary due to her, when the defendant said, that, if she would return, nothing more would be said about the missing money: but she declined to return. After the plaintiff had left the defendant's service, she applied for employment at the establishment of Messrs. Cappers in Bishopsgate Street. They required a reference. The plaintiff accordingly called upon the defendant and asked him if he would give her a character. He refused to do so unless she would acknowledge having taken the 3*l.* 10*s.* A lady named Eastcourt afterwards applied to the defendant, on the part of Messrs. Cappers, for the plaintiff's character; when the defendant uttered the words charged in the declaration,—adding that "he could not give the plaintiff a character; for he had money and goods which he could prove that she had taken."

These were the material facts proved by the plaintiff. She also stated that the defendant had on two or three occasions attempted to kiss her; but she admitted that she had never complained of it.

On cross-examination, she also admitted that she had been accused after she left the defendant's service of stealing a pair of drawers. It appeared that the laundress had brought the garment in question to the defendant's house after the plaintiff had quitted his service, and that, upon its being shown to the defendant, he found it to be similar to those which he had in stock, and accordingly accused the plaintiff of having stolen it, when she said she had had it made for her by a young woman who worked for the house.

*Miss Eastcourt, who was called as a witness, stated that Messrs. Capper declined to employ the plaintiff solely in conse- [*831 quence of what the defendant had said: and she added, that the plaintiff's salary at Messrs. Cappers' would have been 50*l.* a year, besides board and lodging.

On the part of the defendant it was submitted, that, the defendant not being a mere volunteer, but having made the statement alleged in answer to an inquiry from a person whom the plaintiff had referred to him for her character, the communication was *prima facie* privileged, and it was incumbent on the plaintiff to prove express malice; and that, in the absence of such proof, it was the duty of the judge to nonsuit the plaintiff.

The learned judge declined to nonsuit, thinking there was some evidence for the jury that the defendant was not acting *bonâ fide*.

For the defence, the defendant, his wife, and his daughter, were called. The defendant reiterated the accusations against the plaintiff, and the statement about his having left the key in the desk on the occasion when the 3*l.* 10*s.* was missed therefrom. He denied the alleged osculation: but he admitted that his wife told the plaintiff, that, if she would acknowledge having taken the money, nothing more should be said about it. The defendant's wife corroborated the evidence of her husband: and his daughter said, that, on the occasion referred to, she was sitting behind the counter, when the plaintiff sent her upstairs to finish her work, and that, returning for something she had left behind, she saw the plaintiff coming from the part of the shop where the desk was.

After the defendant's counsel had addressed the jury, the defendant was recalled; and, in answer to a question from the learned judge, he *832] said, that, when, *in answer to Miss Eastcourt's inquiry, he accused the plaintiff of stealing, he spoke of the goods, and not of the money.

In leaving the question to the jury, the learned judge told them, that, in order to sustain the action, it was incumbent on the plaintiff to prove malice,—that the defendant was actuated by motives of hostility or ill-will towards her; and that, if they thought he was acting honestly, the speaking of the words would be justified by the occasion.

The jury returned a verdict for the plaintiff, damages 60*l.*

Montagu Chambers, Q. C. (with whom was *Hanse*), now moved to enter a nonsuit, on the ground that there was no evidence of express malice to go to the jury; or for a new trial, on the ground that the damages were excessive. He submitted that it was the duty of the learned judge, at the end of the plaintiff's case, and at all events at the close of the defendant's case, to withdraw the question from the jury,—there being no evidence of express malice, but a mere suspicion that the defendant might have been actuated by some sinister motive; and that the rule as to privileged communications carries with it a larger protection than some judges have supposed. In *Child v. Affleck*, 9 B. & C. 403 (E. C. L. R. vol. 17), 4 M. & R. 338, Parke, B., cautiously uses the words "express malice." He says: "The rule laid down in *Edmonson v. Stevenson*, Bull. N. P. 8, has been followed ever since. It is, that, in an action for defamation in giving a character of a servant, 'the gist of it must be malice, which is not implied from the occasion of speaking, but should be *directly proved*.' The question then is, whether the plaintiff in this case adduced evidence which, if laid before a jury, could properly lead them to find express

*malice. That does not appear upon the face of the letter. [**833* *Primâ facie* it is fair; and undoubtedly a person asked as to the character of a servant may communicate all that is stated in that letter. Independently of the letter, there was no evidence except of the two persons who had recommended the plaintiff. The communication to them, therefore, was not officious,^(a) and Mrs. Affleck was justified in making it. In *Rogers v. Clifton*, 3 Bos. & P. 587, evidence of the good conduct of the servant was given, and the communication also appeared to be officious. In *Blackburn v. Blackburn*, 4 Bingh. 395 (E. C. L. R. vol. 13), 1 M. & P. 33, the occasion of writing the alleged libel did not distinctly appear: it was therefore properly left to the jury to say whether it was confidential and privileged or not: and they found that it was not. Here, the letter was undoubtedly *primâ facie* privileged: the plaintiff therefore was bound to prove express malice, in order to take away the privilege." [ERLE, C. J.—In all those cases the occasion rebuts the presumption of malice arising from the mere speaking or writing of the words.] This case, it is submitted, falls within that class. There is a material distinction between the case of a person officiously volunteering a statement and that of one simply answering a question that is put to him. [WILLES, J.—Parke, B., in *Toogood v. Spyring*, 1 C. M. & R. 181, 4 Tyrwh. 582, uses the term "*actual malice*." WILLIAMS, J.—And also "*express*," which shows that he understood by "*express malice*" actual or extrinsic malice.] In *Taylor v. Hawkins*, 16 Q. B. 308, it was held, that, in an action of slander, if the facts proved are such that the communication is by the rules of law privileged, the judge ought not to leave any question to the jury as to malice, unless the plaintiff gives further evidence showing a probability *that the com- [**834* munication was made maliciously rather than that it was made *bonâ fide*. There, a master, having dismissed his servant, refused to give him a character, alleging to those who asked the character that he had discharged him for dishonesty. The servant's brother afterwards inquired of the master why he had treated the servant so, and was keeping him out of a situation. The master said—"He has robbed me; and I believe for years past;" adding, that he concluded so from the circumstances under which he had discharged the servant. Only one instance of actual robbing had been imputed. It was held that the answer did not go beyond the privilege afforded by the inquiry: and, no further proof being offered by the plaintiff to show malice, that the judge ought not to have left the question of malice to the jury. "The rule," said Lord Campbell, "is, that, if the occasion be such as repels the presumption of malice, the communication is privileged, and the plaintiff must then, if he can, give evidence of malice; if he gives no such evidence, it is the office of the judge to say that there is no question for the jury, and to direct a nonsuit or a verdict for the defendant. Otherwise, there might be a question for the jury in every case where a master, however fairly, gives the character of a servant: and, if they conceived that there was malice lurking in the mind of the master, they might give a verdict for the plaintiff on the ground merely of the communication having taken place: and this

(a) See *Fryer v. Kinnersley*, 15 C. B. N. S. 422 (E. C. L. R. vol. 109)

would apply to all cases in which the occasion has been said to repel the presumption of malice. The present was one of those occasions. As Lord Ellenborough said, in *Dunman v. Bigg*, 1 Campb. 269, n., the communications of business are not to be beset with actions of slander. Then, if this be so, it is admitted here that no express evidence was given to show a malicious *motive; nothing was *835] stated that was untrue within the defendant's knowledge. The learned judge therefore ought to have laid it down that there was no evidence of malice for the consideration of the jury." And Erle, J., referred to *Toogood v. Spyring*, 1 C. M. & R. 181, 4 Tyrwh. 582, and *Somerville v. Hawkins*, 10 C. B. 583 (E. C. L. R. vol. 70), and to *Wright v. Woodgate*, 2 C. M. & R. 573, Tyrwh. & G. 12, where Parke, B., says,—“The proper meaning of a privileged communication is only this, that the occasion on which the communication was made rebuts the inference *primâ facie* arising from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice in fact,—that the defendant was actuated by motives of personal spite or ill-will, independent of the occasion on which the communication was made.” He then goes on,—“In the present case, was there evidence to show ‘motives of personal spite or ill-will?’ What amounts to such evidence, is pointed out in the judgment delivered by Maule, J., in *Somerville v. Hawkins*: ‘On considering the evidence in this case, we cannot see that the jury would have been justified in finding that the defendant acted maliciously. It is true that the facts proved are *consistent* with the presence of malice, as well as with its absence. But this is not sufficient to have the question of malice left to the jury; for, the existence of malice is consistent with the evidence in all cases except those in which something inconsistent with malice is shown in evidence: so that, to say, in all cases where the evidence was consistent with malice, it ought to be left to the jury, would be in effect to say that the jury might find malice in any case in which it was not disproved,—which would be inconsistent with the admitted rule, that, in cases of privileged communication, *836] malice must be proved, and therefore its absence must be *presumed until such proof is given. It is certainly not necessary, in order to enable a plaintiff to have the question of malice submitted to the jury, that the evidence should be such as necessarily leads to the conclusion that malice existed, or that it should be inconsistent with the non-existence of malice; but it is necessary that the evidence should raise a probability of malice, and be more consistent with its existence than with its non-existence.’ I thought at the trial that the extent of the statement afforded some evidence of malice for the consideration of the jury: but my opinion is now altered by *Somerville v. Hawkins*.” [ERLE, C. J.—The circumstances here do not show the defendant to have been a wholesome-minded man.] If the defendant did really believe that the plaintiff was dishonest, and had given her a good character, and she acted dishonestly in her new service, he might have rendered himself liable to an action, or to a summary proceeding before a magistrate under the 32 G. 3, c. 56, and a fine of 20*l*. Then, the damages were largely disproportionate to the injury sustained by the plaintiff.

ERLE, C. J.—I am of opinion that there should be no rule in this

case. It was an action for defamation. Evidence was given on the part of the plaintiff of the uttering of the words, and of the occasion of their utterance; and evidence was given on the part of the defendant explaining the circumstances under which the words were uttered. The defamation complained of was the imputation of dishonesty to the plaintiff: and the case went to the jury upon the whole of the evidence (which the learned judge was bound to leave to them). It was left to them to say whether or not the defendant believed the imputations he made upon the plaintiff to be true. The jury found that he **did not*: and the learned judge reports to us that he is not dissatisfied with the verdict. It appeared that the plaintiff, in [*837 consequence of the utterance of the slanderous words, lost an engagement at 50*l.* a year, with her board. The jury gave her 60*l.* damages: and I cannot say that that sum was excessive. As to the verdict being against evidence, and as to the alleged disproportion of the damages to the injury sustained, there will be no rule. Mr. Chambers has also contended that it was the duty of the learned judge to direct a nonsuit at the close of the plaintiff's case, because it appeared upon her own evidence that the words were spoken upon an occasion which *primâ facie* justified the speaking, viz. in answer to an inquiry as to her character and competency, made by a person with whom she was seeking an engagement. Undoubtedly, if at the close of the plaintiff's case it appears that the words were spoken upon an occasion which *primâ facie* justified them, and nothing more is shown, it is the judge's duty to direct a nonsuit. So is the law laid down in the case of *Taylor v. Hawkins*, 16 Q. B. 308 (E. C. L. R. vol. 71), founded upon *Somerville v. Hawkins*, 10 C. B. 583 (E. C. L. R. vol. 70). But the law is, that, if the plaintiff gives evidence from which the jury may infer malice,—which I take to mean, if he cast imputations which he did not believe to be true, or was acting from sinister or corrupt motives, and not with the *bonâ fide* intention of discharging a duty social or moral,—the plaintiff may sustain the action, notwithstanding that the words were spoken upon an occasion which *primâ facie* justified them, viz. in answer to an inquiry. The law is clearly and uniformly so laid down from the older cases down to the present time. The utterance of defamatory matter carries with it evidence of malice, which is essential to the maintenance of the action. The occasion on which the words are spoken may rebut this *primâ facie* evidence; and then additional evidence must be adduced [*838 on the part of the plaintiff to show actual or express malice: and upon that the question is to be left to the jury whether the defendant spoke the words with an honest belief that the imputation conveyed by them was true, or from motives of malice or ill-will. In *Wright v. Woodgate*, 2 C. M. & R. 573, Tyrwh. & G. 12, the defendant was the solicitor employed in an equity suit on behalf of the plaintiff, a minor. The plaintiff was desirous of changing his solicitor, and informed the defendant of it. The defendant thereupon wrote a letter to the plaintiff's next friend (who was liable for the costs of the suit), dissuading him from giving any directions in the matter, and alleging, among other observations on the plaintiff's conduct, that a civil engineer to whom the plaintiff had been apprenticed had made him a present of his indentures, because he was worse than

useless in his office: and it was held that this was a privileged communication, and that the defendant was entitled to the verdict, unless the plaintiff gave some evidence beyond the mere publication of the letter, of the existence of malice. Parke, B, there says: "The proper meaning of a privileged communication is only this, that the occasion on which the communication was made rebuts the inference *prima facie* arising from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice in fact,—that the defendant was actuated by motives of personal spite or ill-will, independent of the occasion on which the communication was made. In the present case it became, in my opinion, incumbent upon the plaintiff to show malice in fact. This he might have made out either from the language of the letter itself or by extrinsic evidence, as by proof of the conduct or expressions of the defendant, *839] showing that he was actuated by a motive of personal ill-will."

*The same rule is adopted by Lord Campbell in *Taylor v. Hawkins*, 16 Q. B. 308 (E. C. L. R. vol. 71). "The rule," says that learned judge, "is, that, if the occasion be such as repels the presumption of malice, the communication is privileged, and the plaintiff must then, if he can, give evidence of malice: if he gives no such evidence, it is the office of the judge to say that there is no question for the jury, and to direct a nonsuit or a verdict for the defendant." A plaintiff does not sustain the burthen of proof which is cast upon him, by merely giving evidence which is equally consistent with either view of the matter in issue. Where the presumption of malice is neutralized by the circumstances attending the utterance of the slander or the publication of the libel, the plaintiff must give further evidence of actual or express malice, in order to maintain his action. Did the evidence given by the plaintiff here warrant the jury in inferring that the defendant was actuated by malicious motives when he charged the plaintiff with dishonesty? Did he believe the charge to be true, or did he make it from some corrupt motive? I think, that, as the charge of stealing the 3*l.* 10*s.* from the desk was not made until after the plaintiff had left the defendant's service, and he promised to say nothing about it if she would resume her employment, and he on a subsequent occasion said that if she would acknowledge having taken the money, he would give her a character,—the jury were well warranted in coming to the conclusion that he was not acting *bonâ fide* in the performance of that most important duty between man and man, the giving the character of a servant. What he in effect says to the plaintiff is—"Acknowledge yourself to be a thief, and I will give you such a character as will get you the employment you seek." The learned judge was bound to leave all that to the jury, and it was for them to say whether or not he acted from *840] sinister or *corrupt motives. I think the question was properly left: and I see no ground whatever for being dissatisfied with the result.

WILLIAMS, J.—As to the verdict being against evidence,—Mr. Chambers strongly insisted that the defendant was entitled to the verdict, if, when he made the charge he did, he believed it to be true, however mistaken he might be. I told the jury that this was perfectly correct: and I went on to leave to them the question whether

the defendant did really believe the charge to be true, or did he make it from some sinister or improper motive. There was much to be said, and much was said, on both sides. As to the matter of law,—the statement of the way in which the question went to the jury shows how the matter stood at the end of the plaintiff's case. If the defendant did not really believe that the charge he made was true, he was not entitled to the protection which the law throws around communications of this nature which are called privileged,—whether you call it express malice or actual malice or anything else. I could not stop the case. As to the damages, there clearly is no pretence for interfering.

WILLES, J., and BYLES, J., concurring,

Rule refused.

2/10/19

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TO

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ARBITRAMENT.

Conduct of Arbitration.

1. Although mercantile arbitrators are not bound by the strict rules of evidence, yet they cannot be permitted to transgress that fundamental principle of justice which declares that no man shall be condemned, either civilly or criminally, without being afforded an opportunity of hearing the evidence adduced against him, and offering his defence. *In re Brook, Delcomyn and Badart*, 403.

2. A contract was entered into for the sale of a cargo of rape-seed to be shipped at a Danish port for Rochester, "warranted to be at the time of shipment in sound, dry, and merchantable condition," and with a stipulation that "any dispute arising out of the contract should be settled by arbitration in the usual way." On arrival of the rape-seed at Rochester, it was found in such bad condition that the buyer refused to receive it. Ultimately the matter was referred to two arbitrators,—A. named on the part of the seller, and B. on the part of the buyer,—with recourse to an umpire, to be chosen by them in case of disagreement. The arbitrators not agreeing, the matter was left to the umpirage of C., to whom A. and B. each sent a written statement containing their respective views, and also certain documents which had been before them. The umpire, without calling any of the parties before him, but professing to proceed upon the statements and documents so submitted to him, made an award directing that the seller should take back the cargo, and repay the buyer the amount of the invoice-price, which he had paid. The seller having afterwards discovered that the umpire had, without any notice to him or to A., his arbitrator, inspected samples of the seed at the counting-house of B., the other

ARBITRAMENT.

Conduct of Arbitration (continued).

arbitrator, and also had communications with the persons by whom the cargo had been inspected and the samples taken,—moved to set aside the award. The Court made the rule absolute, on the ground that the conduct of the umpire (though sworn by several competent persons to be sanctioned by mercantile usage) was a violation of the universal principles of justice. *In re Brook, Delcomyn and Badart*, 403.

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Deed of Assignment.

Act of bankruptcy.]—1. A trader, by a bill of sale dated the 24th of April 1860,—reciting that he was indebted to M. in the sum of 98*l.* for goods already delivered, and that he was desirous of obtaining a further supply to the extent of 82*l.*, which M. had declined to furnish without security,—assigned to M. all his household furniture, stock-in-trade, and effects for securing the 180*l.* and any further advances which M. might make to him,—with a proviso for redemption on payment, and a power to M. to seize and sell if the money should not be paid on demand. No further advance beyond the 98*l.* either in money or goods was made by M. At the time of the execution of this deed, the trader was indebted to several other creditors in sums sufficient to constitute good petitioning-creditors' debts:—Held, that the execution of the deed was an act of bankruptcy. *Topping, app., Keysell, resp., 258.*

Title of assignees.]—2. Three days after the date of the bill of sale, K. another creditor, applied to the trader for payment of his debt, and by pressure obtained from him goods to the value of 39*l.* 9*s.*, being part of those comprised in M.'s bill of sale,—having notice at the time that the whole had been already assigned to M. On the 7th of May, one W., to whom the trader owed 74*l.* at the time he gave the bill of sale to M., petitioned for an adjudication of bankruptcy against him. A meeting of the creditors took place, and, M. having consented to give up the proceeds of the goods which he had sold under the bill of sale, it was agreed that the trader should execute a deed of assignment for the benefit of all his creditors under the Bankruptcy Act, 1861, which was accordingly done, and the appellants were appointed trustees, and the deed duly registered:—Held, that the title of the trustees under the deed of assignment by virtue of the 197th section related back to the execution of the bill of sale, and so overrode the transaction of the 27th of April, and consequently that they were entitled to recover from K. the value of the goods which he had obtained after notice of the act of bankruptcy. *Id.*

3. Held,—affirming the judgment of the Court of Common Pleas,—that a certificate given under the 198th section of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), of the filing of a deed under s. 192, which deed had been held to be void on the ground that it purported to be made between the debtor and such of his creditors as should execute the same, and therefore impliedly excluded from its benefits and provisions non-executing creditors, afforded no protection to bail who had undertaken to render the debtor in the Mayor's Court, London. *Ilderton v. Jewell*, 142.

Under s. 200.]—4. A deed in the form given in Schedule D. to the Bankruptcy Act, 1861 (though duly executed and registered), cannot be pleaded in bar to an action against the debtor by a creditor who has assented to and executed the same, for a debt in respect of which such creditor has so assented. *Eyre v. Archer*, 638.

Order and Disposition.

5. A., an innkeeper at Sheerness, being indebted to B., under what the jury thought sufficient pressure, on the 30th of May employed his own attorney to prepare a bill of sale of all his effects in favour of B., to secure an existing debt and a small further advance (the amount being about a fair equivalent for the value of the goods). and sent it to B. On the 10th of July B. sent a man to A.'s premises to paint out A.'s name and on the 13th went

BANKRUPTCY AND INSOLVENCY.*Order and Disposition (continued).*

down to Sheerness and took possession, leaving A. there to manage the concern on his behalf. On the 15th A. filed a petition in bankruptcy, and on the 16th was duly adjudged bankrupt. In an action by the assignees to recover the value of the goods thus conveyed,—the jury having found that the transaction was *bonâ fide*, and that possession was really and notoriously taken by B., prior to the bankruptcy:—Held, that the transaction could not be avoided either as an act of bankruptcy (there being no relation) or as a fraudulent preference; and that the goods were not in the order and disposition of A. at the time of his bankruptcy. *Shrubsole v. Sussans*, 452.

East Indian Insolvency Act.

6. A vesting-order made upon the petition of a trading firm under the Indian Insolvency Act, 11 & 12 Vict. c. 21, vests in the official assignee the separate property of each partner as well as the joint estate of the firm. *Brown v. Carbery*, 2.

BEER SHOP.*Certificate of Character.*

The 6th section of the 3 & 4 Vict. c. 61, imposes penalties upon a person who for the purpose of obtaining an Excise license to retail beer, produces or makes use of a certificate of "good character" (as required by the 2d section of the 4 & 5 W. 4, c. 85), knowing the same to be false:—Held, that the mere fact of the party living in a state of concubinage was not such an absence of "good character" as to justify a conviction for using the certificate knowing it to be false,—*dubitante Williams, J. Leader, app., Yell, resp.*, 584.

BILL OF LADING,—See SHIPPING.

BOUGHT AND SOLD-NOTE,—See PLEADING.

CANAL COMPANY.*Equality of Charge for Tolls.*

1. By a canal act the company of proprietors were entitled to demand a fixed sum for goods carried upon any part of the canal, "which said respective rates should be equal throughout the whole length of the said intended canal." By a subsequent public act, 8 & 9 Vict. c. 28, proprietors of canals were empowered from time to time to alter or vary the tolls granted to them, "either upon the whole or for any particular portion or portions of such canals, according to local circumstances, or the quantity of traffic, or otherwise, as they should think fit,"—with a proviso that such tolls were to be charged equally to all persons, and after the same rate, whether per mile, or per ton per mile, in respect of all boats, &c., of the like description passing along or using the same portion of the canal, and all goods, &c., of the like description conveyed or propelled in a like boat, &c., passing along or using *the same portion* of the said canal, &c., *under the like circumstances, &c.*:—Held, that it was competent to the company to take a proportionably less toll per ton per mile for goods carried a given distance (five miles) along *any part* of the canal, than for goods carried less than that distance. *Strick v. The Swansea Canal Company*, 245.

2. Also, that it was competent to the company to agree to carry at a lower rate for a particular individual, in consideration of a large guaranteed minimum toll, in order to enable them to enter into a successful competition with a rival line of railway. *Ib.*

CHAMPERTY.*Agreement made Abroad.*

1. An agreement (to be carried into effect in this country) which would be void on the ground of champerty if made here, is not the less void because made in a foreign country where such a contract would be legal. *Grell v. Levy*, 73.

2. Where, therefore, an attorney entered into an agreement in France, with a French subject, to sue for a debt due to the latter from a person residing here, whereby the attorney was to receive by way of recompense a moiety of the amount recovered:—Held, that, the agreement being void for champerty, the attorney was remitted to his ordinary retainer as an attorney, and the work having been done, and the client having received the benefit of it, was entitled to his costs as between attorney and client. *Ib.*

CHECK.*Presentment and Notice of Dishonour.*

1. On Wednesday, May 6, A. received at Monmouth a check drawn upon M. & Co., bankers at Ross, about ten miles distant. On Friday the 8th he paid into his bankers at Monmouth, and they on the same day sent it by post to their London agents (the City Bank), to be passed through the country clearing-house there. The drawees' London agents were B. & Co. (whose names appeared in a printed memorandum at the foot of the check), but their account with them was closed on Thursday the 7th. The check being

CHECK.*Presentment and Notice of Dishonour (continued).*

refused by B. & Co. at the clearing-house, the City Bank sent it by post on Saturday the 9th for payment to the drawees, who kept it until Friday the 15th, and then returned it to the City Bank, who received it on Saturday the 16th, and sent it by that day's post to their correspondents, the Monmouth Bank, who (receiving it on Sunday the 17th) sent notice of the dishonour by the post on Tuesday the 19th to the drawer, whom it reached on the 20th. A run upon the bank of M. & Co. commenced on Monday the 11th, and on Wednesday the 13th, at noon, they finally stopped payment. In an action in the county-court by the Monmouth Bank against the drawer, it was proved that the drawees sent cash through the post to country bankers, in payment of checks drawn upon them, as late as Monday the 11th, but did not honour any checks forwarded to them by London bankers after Thursday the 7th; that, if the check in question had been received by them by post from the City Bank on Friday the 8th, it would not have been paid; but that, if presented across the counter at any time before the final stoppage on Wednesday the 13th, it would have been paid. The county-court judge having upon these facts nonsuited the plaintiffs,—this court, upon appeal, affirmed his decision; holding that the presentment was not in due time. *Bailey, app., Bodenham, resp.*, 288.

2. *Semble*, also, that the notice of dishonour was too late. *Ib.*

3. Where a check is drawn upon a country banker,—*quare* whether sending it by post from London to the drawee, with a demand of payment, is a good presentment? *Ib.*

4. The mention of the names and address of the London agents in a memorandum at the foot of a country banker's check, does not make the check payable at the place so indicated. *Ib.*

CIRCUITY OF ACTION.*Where a Defence.*

To make a defence available on the ground of the avoidance of circuity of action, the damages must necessarily be the same in character and amount. *Speeding v. Young*, 824.

COMMON LAW PROCEDURE ACT, 1852.

Section 18. *Writ for Service Abroad*,—See WRIT OF SUMMONS.

Sections 112, 113. *Special Jury*,—See SPECIAL JURY.

COMMON LAW PROCEDURE ACT, 1854.

Section 50. *Discovery*,—See PRACTICE, 1.

Section 51. *Interrogatories*,—See PRACTICE, 2, 3.

CONDITION,—See COVENANT.**CONDITION PRECEDENT.***What amounts to.*

The plaintiff declared upon an agreement for a tenancy in these terms,—“1. Mr. T. (the plaintiff) engages to complete the whole work necessary by the 14th June next.” Then followed an enumeration of the matters to be done by the plaintiff; and the agreement concluded,—“In consideration of these conditions being fulfilled, Mr. M. (the defendant) engages to take the house No. 51, B. Park, for three years, at the annual rent of 130*l.*, to be paid quarterly. Rent to begin from Midsummer next:”—Held, that the completion of the “work necessary” by the day named for that purpose was a condition precedent to the plaintiff's right to sue the defendant for not becoming tenant. *Tidey v. Mollett*, 298.

COSTS.*Of Preparing for Trial.*

1. The defendant's costs of “preparing for trial” cannot be allowed where the plaintiff discontinues before notice of trial,—even though liberty had been reserved to the plaintiff under a judge's order to set down the cause for trial before issue joined, and a special jury had been struck. *Curtis v. Platt*, 465.

Of Motions and Rules.

2. Where cause is shown against a rule in the first instance, the costs are in all cases in the discretion of the court, but will rarely be given. *Norris, app., Carrington, resp.*, 396.

Costs in this Cause.

3. Costs of a witness whose testimony is rejected as irrelevant are not allowed as between party and party. *Speeding v. Young*, 824.

Concurrent Jurisdiction.

4. A., who resided at West Bromwich (within the jurisdiction of the Staffordshire county-court), being the holder of a promissory note of B.'s testator for 100*l.*, sent his collector to

COSTS.

Concurrent Jurisdiction (continued).

B., who resided at Birmingham (within the jurisdiction of the Warwickshire county-court), to demand payment or security. B. (at Birmingham) consented to give A. a further charge upon some property there on which he already held a mortgage for 200*l.*, and the collector (either at the request or with the assent of B.) went to C., a solicitor at West Bromwich, by whom the original mortgage had been prepared, and there gave him instructions to prepare the necessary security, which B. afterwards executed at West Bromwich. C. afterwards sued B. in a superior court for his charges, and obtained a verdict for 6*l.* 15*s.* 4*d.* :—Held, that the cause of action arose “in some material point” within the jurisdiction of the Birmingham county-court, and consequently there was not concurrent jurisdiction within the 128th section of the 9 & 10 Vict. c. 95, so as to entitle C. to his costs. *Jackson v. Grimley*, 380.

Rule or Order for, under 15 & 16 Vict. c. 54, s. 4.

5. Although the court is not bound by the exercise of discretion by the judge who tries the cause in refusing to certify for costs where the verdict is under the limit, yet it will not upon light grounds interfere. *Courtenay v. Wagstaff*, and *Reed v. Wagstaff*, 110.

6. In an action for wrongfully dismissing the plaintiff from his employment as a parliamentary reporter for a newspaper, and also for work and labour, it was sought to fix the defendant with liability as a partner, upon the ground that he had advanced money for starting the paper, under a written agreement with one H., containing very stringent stipulations showing that the defendant was to have unlimited control over the publication, with the option of declaring himself a partner at any time within twelve months, and to trust solely to the profits for the repayment of his advance, with interest, and by parol evidence of personal interference in the management. At the trial it was assumed that the agreement alone did not constitute a partnership between the defendant and H.; and the jury,—having found that the plaintiff's engagement was not for the session, but a weekly engagement only, and negatived that the defendant had prior to the plaintiff's engagement allowed himself to be held out as a partner, but affirmed that he had done so since,—returned a verdict for the plaintiff for 15*l.* 15*s.*; and the judge, though he certified for a special jury, refused to certify under the 13 & 14 Vict. c. 61, s. 12, that there was a sufficient reason for bringing the action in the superior court:—

The court, considering that the difficulty of the question as to the construction and effect of the agreement justified the plaintiff in resorting to the superior tribunal, made an order for costs under the 15 & 16 Vict. c. 54, s. 4. *Ib.*

COUNTRY BANKER,—See CHECK.

COUNTY COURT.

Costs,—See COSTS, 4, 5, 6.

COVENANT.

What amounts to.

1. The words “covenant” and “condition” when used in an *agreement*, do not necessarily mean a covenant under seal or a condition in the strict legal sense of the word, but may, in order to effectuate the intention of the parties, be construed to mean “contract” or “stipulation.” *Hayne v. Cummings*, 421.

2. In an agreement between A. and B., not under seal, expressed to be made “in consideration of the rents and covenants to be reserved and contained in the lease agreed to be granted,” it was provided that, as soon as B. should have executed certain specified repairs, &c., A. would lease certain premises to him, his executors, &c., for thirty-five years from a day past, at the yearly rent of 15*l.*; such lease to contain certain specified covenants on the part of B. as to rent and other matters, and also all other usual and proper covenants, and especially a proviso for re-entry for non-payment of rent or non-performance of covenants: and it was further agreed, that, until the lease should be granted, the plaintiff, his executors, &c., should have the same powers and remedies for recovering and enforcing payment of the rent and performance of the covenants as fully as if the lease had been actually granted: the repairs to be completed by a given day.” Then followed this proviso,—“Provided always, that, if the rent should be in arrear, &c., or if B., his executors, &c., should make default in the observance and performance of the covenants and conditions on his or their part herein contained, then and in either of the said cases it shall be lawful for the said B., his executors, &c., to enter the said premises, &c., and the same to have again and enjoy as in his or their former estate, and the said B. and all other occupiers thereof thereout to remove, and thenceforth these presents and everything herein contained shall cease and be void.” B. was let into the premises, and paid rent.

COVENANT.*What amounts to.*

The repairs not having been done by the time agreed on :—Held, that A. was entitled to re-enter. *Hayne v. Cummings*, 421.

CUSTOM,—See **SHIPPING**, 1, 2.

DAMAGES.*Measure of.*

60*l.* damages in an action of slander, where it was proved, that, in consequence of the speaking of the words, the plaintiff lost an employment worth 50*l.* a year, besides board, &c.,—Held, not excessive. *Jackson v. Hopperton*, 829.

DEED OF ARRANGEMENT,—See **BANKRUPTCY AND INSOLVENCY**, 1-4.

DEFAMATION,—See **SLANDER**.

DEVISE.*Construction of.*

1. For the purpose of construing a will, the court must be informed of the circumstances surrounding the testator when making his will,—such as his family status and the nature of his property. Extraneous evidence of these matters is therefore admissible. *Webber v. Stanley*, 698.

2. One T. A. S., being seised of an estate in Wales worth about 46,000*l.* a year, and also of freehold estates partly in Hants and partly in Wilts (worth about 4500*l.* a year), which were known as his “Tedworth estate,” by his will in 1857,—after giving certain annuities (including one of 50*l.* for life to his valet A.), which he charged upon “all his lands and hereditaments at or near Tedworth,”—devised to his widow in fee “all his lands and hereditaments at or near Tedworth aforesaid.” The widow, by her will, dated in 1858, after disposing of her Welsh estate, subject to a charge of 40,000*l.* to be raised thereout, which sum she declared that she intended to be “an addition to her Tedworth estates thereafter devised,” proceeded as follows,—“I give and devise my mansion-house at Tedworth, in the county of Hants, and all my manors, farms, lands, tenements, and hereditaments in the county of Hants, devised to me by the said will of my said late husband (subject to the annuities charged thereon by such will, and subject to an additional or further annuity of 50*l.* per annum to be payable to A., the valet of my late husband, during his life, as hereinafter mentioned), and all other hereditaments in the said county of Hants of or to which I shall be seised or entitled, or as to or over which I shall have a disposing power by my will at my death (all which hereditaments in the county of Hants are hereinafter described or referred to as my Tedworth estate),” to the use of her nephew, the defendant, for life, &c. She then proceeded to give the tenant for life the power of charging “her said Tedworth estate” for jointures and provisions for younger children to an extent not to exceed 1000*l.* per annum. Throughout the will the testatrix spoke of the property she was dealing with as “my said Tedworth estate :” and she directed that the mansion-house and grounds should be kept up in their then present state, and made the furniture, &c., heir-looms. She then directed that the 40,000*l.* charged upon the Welsh property should be laid out in the purchase of freehold lands, &c., near to or adjoining her said Tedworth estate, or elsewhere in the said county of Hants, or in some adjoining county or counties, and charged the additional annuity to the valet A. upon “all her hereditaments at or near Tedworth aforesaid.” The mansion-house at Tedworth and a portion only of the lands forming the Tedworth estate (of the annual value of about 2000*l.*) were in the county of Hants; the residue (of the annual value of about 2500*l.*) being in the adjoining county of Wilts. There was no boundary, either natural or artificial, to separate the two counties; and some of the farms were partly in Hants and partly in Wilts, the county boundary in some instances dividing fields, and even separating cottages from their gardens. The mansion-house of Tedworth was largely disproportionate to the Hants part of the property, even when increased by the legacy of 40,000*l.* :—Held, that, as there was a property which every part of the description “my mansion-house at Tedworth, in the county of Hants, and all my manors, farms, lands, &c., in the county of Hants,” fitted, and on which every word had full effect, the devise must be limited to so much of the land as was locally situated within the county of Hants, there being no intention expressed of giving property situated out of the county of Hants. *Id.*

DISCOVERY,—See **PRACTICE**, 1.

DISCONTINUANCE,—See **COSTS**, 1.

DISHONOUR.*Notice of*,—See **CHECK**.

ECCLESIASTICAL LAW.*Fees of Registrars of Archdeaconry Court.*

1. The immemorial existence of fees of an office may be presumed from uninterrupted modern usage, unless there be some evidence given to the contrary. *Shephard v. Payne*, 132.

2. The modern usurpation of an excess does not affect the title to the original fees. *Ib.*

3. Whether or not there may be an ancient fee varying in pecuniary amount from time to time with the changes in the value of money and other circumstances, and subject only to the restriction that it shall be reasonable,—*quære?* *Shephard v. Payne*, 132.

ENCLOSURE ACT.*Construction of 34 G. 3, c. 40, Long Bennington Enclosure Act.*

By a local enclosure act of 34 G. 3, c. 40,—reciting that A., as lay impropriator, was entitled to the great, and B., as vicar, to the small tithes,—the commissioners were empowered to set out certain lands as the value of and which should be taken as a full satisfaction and compensation for the tithes both great and small: and, out of the lands so to be set out in lieu of tithes, they were to allot thirty acres to B., and all the remainder to A., subject to the payment of a certain corn-rent (to be ascertained in the usual way), which should with the thirty acres, in their judgment be a fair compensation for the vicarial tithes and payments in lieu of tithes payable to the vicar,—which rent or sum of money “should be payable and paid to the vicar and his successors” quarterly, “clear of all parochial taxes, rates, dues, and assessments whatsoever:” and it was enacted that the tithes in lieu whereof the said thirty acres of land were so directed to be allotted, and such rent was to be paid, should cease and be for ever extinguished:—Held, that the land so allotted to A. in lieu of the vicarial tithes, and so charged with such rent, was liable to be assessed to the poor-rate. *Hackett, app., The Churchwardens, &c., of Long Bennington, resp.*, 38.

EVIDENCE.*Letter of Agent,—See PRINCIPAL AND AGENT.***FACTORY ACTS.***Construction of.*

1. By the 73d section of the 7 & 8 Vict. c. 15, premises which are used solely for the manufacture of *paper* are excluded from the operation of the Factory Acts. *Coles, app., Dickinson, resp.*, 604.

2. A. was possessed of paper-mills in Hertfordshire and of a mill at Manchester. At the latter place he employed steam-power to prepare what is called “half-stuff,” which is made from cotton-waste and refuse and rags. The half-stuff was afterwards sent to the mills in Hertfordshire to be manufactured into paper:—Held, that the mill at Manchester was exempted from the operation of the Factory Acts,—although the “half-stuff” was capable of being converted into articles other than paper. *Ib.*

FEEES OF OFFICE,—See ECCLESIASTICAL LAW.**FELLOW-SERVANT,—See MASTER AND SERVANT.****FISHERY,—See SALMON FISHERY.****FRAUDS, STATUTE OF,—See STATUTE OF FRAUDS.****FRAUDULENT PREFERENCE,—See *Shrubeole v. Sussame*, 452.****GOODS.***Sale of,—See SALE OF GOODS.***GOODWILL,—See RAILWAY COMPANY, 3.****HIGHWAY ACT.***Obstruction of Highway.*

The mere fact that a piece of ground, part of a public highway, has for twenty years been used by an innkeeper for the standing of the vehicles belonging to his guests, is no answer to a complaint for the obstruction under the 72d section of the Highway Act, 5 & 6 W. 4, c. 50. *Gerring, app., Barfield, resp.*, 597.

INDIAN INSOLVENCY ACT.*Construction of 11 & 12 Vict. c. 21.*

A vesting-order made upon the petition of a trading firm under the Indian Insolvency Act, 11 & 12 Vict. c. 21, vests in the official assignee the separate property of each partner as well as the joint-estate of the firm. *Brown v. Carbery*, 2.

INSOLVENT DEBTOR,—See BANKRUPTCY AND INSOLVENCY.

INSURANCE.*Total Loss.*

1. *Pre-paid freight.*]—Where a ship is by perils of the sea so much damaged as to be incapable of repair so as to prosecute the adventure, except at an expense exceeding her value together with the freight when repaired, the master is justified in abandoning the voyage, and is not bound as agent of his owner to send the goods on in another bottom. *De Cuadra v. Swann*, 772.

2. In an action upon a policy on goods from Cadiz to Monte Video and Buenos Ayres, and also "on cash on account of freight, 216*l.*," the declaration alleged the shipment of the goods and the payment of the 216*l.* on account of freight, and then proceeded to aver that, whilst prosecuting the voyage, the vessel encountered a storm, and sustained so much damage that she became and was disabled from proceeding without being repaired, and could not be repaired so as to proceed on the voyage without incurring an expense greater than her value would have been when repaired, together with the freight which she would have earned on the said voyage; that, the ship being so disabled from continuing the voyage with the goods on board, the master was obliged to and did abandon the voyage and the earning of the residue of the freight; that the freighter procured two other vessels to carry the goods on, at a rate of freight exceeding the freight originally payable under the charter-party; and that the 216*l.* so paid in cash on account of freight as aforesaid, by reason of the premises, became and was wholly lost to the plaintiff. The declaration then went on to aver that one of the substituted vessels sustained so much damage that she was obliged to put back to Gibraltar, and there unload, and the goods were sent on to Monte Video by the other; and that, by reason of the premises, the plaintiff sustained a total loss of the 216*l.* so paid in cash on account of freight as aforesaid, and was put to charges in transshipping the goods, &c.:—Held, that the declaration disclosed a sufficient justification for the master's abandoning the voyage, and consequently that the plaintiff was entitled to recover as for a total loss of the prepaid freight. *Ib.*

3. Plea, that the substituted vessel into which the goods were first transhipped, at the time the goods were first at risk on board of her was not seaworthy:—Held, a bad plea. *Ib.*

INTERROGATORIES,—See **PRACTICE**, 2.

IRISH JUDGMENT,—See **WRIT OF SUMMONS**.

JOINT-STOCK COMPANY.*Liability of Directors.*

1. The provisional directors of a projected joint-stock company resolved at a meeting that the company should be advertised in several newspapers, and directed their secretary to take the necessary steps for that purpose. The secretary accordingly applied to an advertising agent, to whom (on his calling at the company's offices to inquire under what authority the secretary was acting) *he showed the prospectus and the above resolution*:—Held, that the directors who were parties to the resolution were responsible for the cost thereby incurred,—notwithstanding they had been induced to allow their names to appear as directors upon the faith of the secretary's assurance that all preliminary expenses would be provided for by him, and that they would incur no liability,—there being nothing to show that the secretary, in giving the orders, or in communicating to the advertising-agent the resolution of the directors, had acted beyond the scope of his actual or apparent authority as secretary. *Maddick v. Marshall*, 387.

Winding-up.

2. *Action brought without leave.*]—Where an order has been obtained for the winding-up of a joint-stock company, and an official manager and creditors' representative have been duly appointed and chosen, an action brought by a creditor against a shareholder or contributory thereof in contravention of the provisions of the 11 & 12 Vict. c. 45, s. 73, and 20 & 21 Vict. c. 78, s. 7, may be stayed by the court or a judge of the court out of which the writ issues. *Thomas v. Wells*, 508.

3. The insolvency of a member or shareholder of a joint-stock company does not operate a dissolution of the company, whether it be incorporated or unincorporated. *Ib.*

JUSTICES.

Appeal from Decision of,—See **APPEAL**, 2.

LANDS CLAUSES CONSOLIDATION ACT,—See **RAILWAY COMPANY**.

LEASE.

Void by 8 & 9 Vict. c. 106, s. 3.

1. An instrument which is void as a lease, by reason of the provision in the 8 & 9 Vict. c. 106, s. 3, may nevertheless enure as an agreement. *Tidey v. Mollet*, 298.

2. *Stratton v. Pettitt*, 16 C. B. 420, overruled. *Ib.*

LEASE.

Void by 8 & 9 Vict. c. 106, s. 3 (continued).

3. An agreement creating a present demise, void as a lease by the 8 & 9 Vict. c. 106, s. 3, may still enure as an agreement. *Hayne v. Cummings*, 421.

LETTERS PATENT.

Construction of Specification.

1. One who makes a patent article under a license from the inventor, cannot, in an action against him for royalties, set up any objection to the novelty or utility of the invention or the validity of the specification: but, if the claim in the specification is susceptible of two constructions, one of which would make the specification bad and the other and more natural one would make it good, it is competent to him to insist that the latter is the true construction. *Trotman v. Wood*, 479.

2. Three descriptions of anchors were well known—1. the Dutch or common anchor, in which the arms and the shank were all in one piece, the palm or fluke being sometimes placed *inside* and sometimes *outside* the extremity of the arm,—2. Rogers's anchor, the peculiarity of which was that the palm or fluke was placed *outside* the extremity of the arm,—3. Porter's anchor, the arms of which moved on an axis in the shank, the palm being placed *inside* the arm, with a horn or toggle at the back and *of the width of the arm*. The plaintiff took out a patent for "Improvements in anchors," such improvements mainly consisting in placing the palm at the *back* or *outside* or "intermediately of the breadth" of the arm, and making the horn or toggle form part of and of the same width as the palm,—combined with Porter's movable arms. In his specification he thus described his invention,—“The improvements are chiefly applicable to that class of anchors known as ‘Porter's anchors,’ and consist,—first, of forming or fixing the palm intermediately of the breadth of the arm,—secondly, in forming the horn wider than the arm,—and thirdly, in forming or affixing the palm of that class of anchor known as Porter's anchor at the back of the arm.” And, after describing the drawings, he concluded thus:—“I would remark that I am aware that it is not new to place the palm at the back of the arm of ordinary anchors: this part of the invention, therefore, consists of *combining the fixing of the palms to the back of those arms of anchors which move on axes*. The angles which the faces of the arms and the faces of the palms make to the shank and to each other may be varied: but it is important that the angles which the palms make to the shank and those made by the arms should be different. The construction shown are those I employ.” The defendants (having a license from the plaintiff) made anchors with the arms moving on an axis like Porter's, and with the palm at the *outside* of the arm, with a horn of a greater width than the arm, and nearly identical with that described in the plaintiff's specification and drawings; but they forged the arms, palm, and horn *all in one piece*, whereas the plaintiff's palm and horn were formed together and then fixed to the back or “intermediate of the breadth” of the arm. The jury, in an action against the defendants for non-payment of royalties and for an account, found, as regarded the *palm*, that the defendants had adopted the plaintiff's invention, but, not being able to agree as to the horn, they were discharged from any finding as to that:—Held, that the plaintiff was entitled to an account of the anchors so made. *Ib.*

3. Judgment of the Court of Common Pleas, 12 C. B. N. S. 437 (E. C. L. R. vol. 104), affirmed. *Horton v. Mabon*, 141.

LEX FORI,—See MEDICAL PRACTITIONER.

LOCAL GOVERNMENT ACT,—See PUBLIC HEALTH ACT.

MAGISTRATES.

Appeal from Decision of,—See APPEAL, 2.

MASTER AND SERVANT.

Liability of Master for an Injury to a Servant from the Negligence of a Fellow-Servant.

1. The plaintiff, a labourer in the service of a railway company, was employed to fill trucks with ballast at a pit, and to move them when filled along temporarily laid rails on to the permanent rails, and there attach them to an engine. Whilst so employed, one of the temporary rails, in consequence of its having been insecurely placed, through the negligence of another servant of the company, whose duty it was to superintend the laying of them, springing up from the pressure of the loaded truck, struck the plaintiff, and severely injured him:—

Held, that, the injury having been occasioned by the negligence of a fellow-workman of the plaintiff, whilst both were engaged in a common occupation, the company were not responsible, in the absence of evidence that they had knowingly intrusted the duty of lay-

MASTER AND SERVANT.

Liability of Master for an Injury to a Servant from the Negligence of a Fellow-Servant (continued).

ing the rails to an incompetent person. *Lovegrove v. The London, Brighton, and South Coast Railway Company*, 669.

2. The plaintiff was employed by the defendants in constructing a scaffolding for a large building which they were engaged in erecting. Being short of materials, the plaintiff applied to one M., the foreman of the scaffolders, for the necessary supply of boards. M. applied to P., who was the defendants' general foreman or manager, who refused to furnish them, saying that the plaintiff must get on as he best could. The plaintiff proceeded with his work, and, having no flooring to stand on, placed his foot upon a putlog, from the rounded surface of which he slipped, and, falling to the ground, was crippled. In an action against the defendants, charging them with negligence in not supplying sufficient materials, whereby the danger of the work was unnecessarily aggravated, the jury found that the scaffolding was insufficient and insecure to the knowledge of both the general manager P., and the foreman of the scaffolders, M., but *not to the knowledge of the defendants* (who personally never interfered with the works); and they further found that the plaintiff himself was guilty of no negligence:—

Held, dissentiente Byles, J., and dubitante Williams, J.,—that the defendants were not responsible,—the plaintiff and P. being fellow-workmen engaged in a common service, and there being no evidence of *personal* negligence on the defendants' part, in failing to supply sufficient and safe materials, or in selecting an incompetent foreman. *Gallagher v. Piper*, 669.

MEASURE OF DAMAGES,—See DAMAGES.

MEDICAL PRACTITIONER.

Rights and Liabilities of, under 21 & 22 Vict. c. 90.

1. The Medical Act, 21 & 22 Vict. c. 90, s. 32, which prohibits an unregistered practitioner from recovering for advice, attendance, or medicines supplied, is not confined to cases in which the *patient* is sued. *De la Rosa v. Prieto*, 578.

2. Though an unregistered assistant may sue a registered practitioner for salary, an unregistered practitioner cannot sue a registered practitioner for medicines supplied to or attendance upon the patients of the latter at his request. *Ib.*

3. Where medicine or attendance is supplied by an unregistered practitioner to a patient, under a guarantee for payment given by a third person, the statute will afford a defence either to the principal debtor or to the surety; for, the patient does not the less require protection because the paymaster is a third person. *Ib.*

4. A medical officer of a Peruvian vessel of war lying in the Thames engaged the plaintiff, an unregistered practitioner, to attend the crew and troops (partly on board the vessel and partly on shore) during his temporary absence. In an action against the Peruvian officer for the services thus rendered:—Held, that the 32d section of the Medical Act precluded the plaintiff from recovering,—for, by whatever law the contract was to be interpreted, the *remedy* must be governed by the *lex fori*. *Ib.*

MEMORANDA.

Queen's Counsel.

Keane, Johnson, Field, 1.

Serjeants.

Parry, patent of precedence, 1.

Simon, Pulling, Tindal Atkinson, 1.

Privileges of serjeants, 577.

MERCANTILE ARBITRATION,—See ARBITRAMENT, 1.

MERGER.

Of Simple-Contract Debt in a Specialty.

A mortgage-security executed by two (and the wife of the third) of three persons indebted to the mortgagee in a simple-contract debt, does not operate as a merger of the claim on the simple contract in the specialty. *Sharpe v. Gibbs*, 527.

METROPOLIS LOCAL MANAGEMENT ACT, 1862.

General Line of Buildings.

1. *Erection.*—The 75th section of the Metropolis Local Management Act, 1862 (25 & 26 Vict. c. 102), enacts that “no building, structure, or erection shall, without the consent in writing of the metropolitan board of works, be erected beyond the general line of buildings in any street, place, or row of houses in which the same is situate, &c., such

METROPOLIS LOCAL MANAGEMENT ACT, 1864.*General Line of Buildings (continued).*

general line of buildings to be decided by the superintending architect to the metropolitan board of works for the time being." A magistrate having decided, upon summons, that a small conservatory consisting of an iron frame (glazed) projecting beyond the wall of the house, but not beyond the shop-front, was not an "erection" within the statute, and that it was not beyond the "general line of buildings" in the street,—the court upheld his decision. *Saint George, Hanover Square*, app., *Sparrow*, resp., 209.

2. *Seem*, that the certificate of the superintending architect as to the "general line of buildings" is not conclusive. *Ib.*

METROPOLITAN BOARD OF WORKS.*Rights and Powers of.*

Held,—affirming the judgment of the court below, 13 C. B. N. S. 768,—that the metropolitan board of works have no power under the 135th section of the Metropolis Local Management Act, 18 & 19 Vict. c. 120, to erect any works on the bed or soil of the Thames, without first obtaining the consent of the Admiralty, pursuant to the 27th section of the Main Drainage Act, 21 & 22 Vict. c. 104, and of the conservators of the river, pursuant to s. 28: and that consequently they were liable to an action at the suit of the owner of a vessel which sustained damage from grounding upon a pile negligently placed on the foreshore by a contractor employed by them. *Brownlow v. The Metropolitan Board of Works*, 546.

MORTGAGE,—See MERGER.**NEGLIGENCE.***In the Execution of Public Works under Authority of an Act of Parliament.*

1. Held,—affirming the judgment of the court below, 13 C. B. N. S. 768,—that the metropolitan board of works have no power under the 135th section of the Metropolis Local Management Act, 18 & 19 Vict. c. 120, to erect any works on the bed or soil of the Thames, without first obtaining the consent of the Admiralty, pursuant to the 27th section of the Main Drainage Act, 21 & 22 Vict. c. 104, and of the conservators of the river, pursuant to s. 28: and that consequently they were liable to an action at the suit of the owner of a vessel which sustained damage from grounding upon a pile negligently placed on the foreshore by a contractor employed by them. *Brownlow v. The Metropolitan Board of Works*, 546.

In Performance of Work in a Public Highway.

2. Where there are two modes of doing a work in a public highway from which damage may result to a passer-by, the one mode more dangerous than the other,—though both are usual modes,—it is for the jury to say whether the adoption of the former mode amounts under all the circumstances to negligence. *Cleveland v. Spier*, 399.

3. A passer-by who is casually appealed to by a workman for information respecting a thing which the latter is doing in a public thoroughfare, is not to be considered a "volunteer assistant," so as to exonerate the workman's master from responsibility for an injury resulting to the former from the workman's negligent mode of doing the work. *Ib.*

And see MASTER AND SERVANT.

NOTICE OF DISHONOUR,—See CHECK.• **NOTICE OF TRIAL,—See COSTS, 1.****PAPER MILL,—See FACTORY ACTS.****PARTNER.***Insolvency of the Firm.*

A vesting-order made upon the petition of a trading firm under the Indian Insolvency Act, 11 & 12 Vict. c. 21, vests in the official assignee the separate property of each partner as well as the joint estate of the firm. *Brown v. Carbery*, 2.

And see COSTS, 5, 6.

PATENT,—See LETTERS PATENT.**PETITION OF RIGHT.***Where it Lies.*

1. A petition of right will not lie to recover compensation for a wrongful act done by a servant of the Crown in the supposed performance of his duty. *Tobin v. The Queen*, 810.

2. Nor will it lie to recover unliquidated damages for a trespass. *Ib.*

3. The commander of a Queen's ship employed in the suppression of the slave-trade on

PETITION OF RIGHT.

Where it Lies (continued).

the coast of Africa, seized a schooner belonging to the suppliant, which he suspected of being engaged in slave-traffic; and, it being inconvenient to take her to a port for condemnation in a Vice-Admiralty court, caused her to be burnt:—Held, that this was not a case for a petition of right; the remedy for the wrong, if any were done, being against the person who did it. *Ib.*

PHYSICIAN,—See MEDICAL PRACTITIONER.

PLEADING.

Equitable Plea.

To a count for not accepting petroleum pursuant to contract by bought and sold-notes, the defendants pleaded, by way of equitable defence, that the real contract was not that which was contained in the bought and sold-notes, but was a contract for 150 cases of refined petroleum to agree with a sample shown by the brokers at the time of making the contract, and that the brokers, who were acting as agents for both parties, in drawing up the contract, by mistake omitted to state therein that the sale was by sample; that the mistake was not discovered until after the defendants had received a portion of the petroleum; that the plaintiffs were never ready and willing to deliver to the defendants any cases of petroleum as the petroleum they so agreed to sell, except a certain lot of 150 cases; that the petroleum which the plaintiffs were so ready and willing to sell in fact did not agree with the sample, but was greatly inferior thereto, and of less value; and that, as soon as the defendants discovered that fact, they refused to receive any more of it, and gave notice of such refusal to the plaintiffs:—Held, on demurrer, that this plea afforded a good equitable defence,—inasmuch as, the full performance of the agreement having become impracticable by reason of the default of the plaintiffs, the case was not one in which a court of equity could reform the contract, or impose conditions upon the defendants. *Borrowman v. Rossel*, 59.

POOR-RATE.

Liability of Lands allotted under an Enclosure Act.

By a local enclosure act of 34 G. 3, c. 40,—reciting that A., as lay impropriator, was entitled to the great, and B., as vicar, to the small tithes,—the commissioners were empowered to set out certain lands as the value of and which should be taken as a full satisfaction and compensation for the tithes both great and small: and, out of the lands so to be set out in lieu of tithes, they were to allot thirty acres to B., and all the remainder to A., subject to the payment of a certain corn-rent (to be ascertained in the usual way), which should with the thirty acres, in their judgment be a fair compensation for the vicarial tithes and payments in lieu of tithes payable to the vicar,—which rent or sum of money “should be payable and paid to the vicar and his successors” quarterly, “clear of all parochial taxes, rates, dues, and assessments whatsoever:” and it was enacted that the tithes in lieu whereof the said thirty acres of land were so directed to be allotted, and such rent was to be paid, should cease and be for ever extinguished:—Held, that the land so allotted to A. in lieu of the vicarial tithes, and so charged with such rent, was liable to be assessed to the poor-rate. *Hackett, app., The Churchwardens, &c., of Long Bennington*, resp., 38.

And see REFORMATORY.

PRACTICE.

Discovery under the Common Law Procedure Act, 1854, s. 50.

1. *Corporation.*—A railway company may have discovery of documents under the 50th section of the Common Law Procedure Act, 1854, upon the affidavit of their attorney,—it being impossible for them literally to comply with the terms of that provision, and it being the intention of the legislature that its benefit should be extended to all suitors. *Kingsford v. The Great Western Railway Company*, 761.

Interrogatories under 17 & 18 Vict. c. 125, s. 51.

2. A defendant in ejectment will only be allowed to deliver interrogatories to the plaintiff under the 51st section of the Common Law Procedure Act, 1854, where his affidavit discloses special circumstances which satisfy the court or judge that justice requires it. *Pearson v. Turner*, 157.

3. *Stoate v. Rew*, 14 C. B. N. S. 209 (E. C. L. R. vol. 108), confirmed, and *Flitcroft v. Fletcher*, 11 Exch. 543, overruled. *Ib.*

Set-off.

4. *Of cross-judgments.*—A. having obtained a verdict against B. & Co., his bankers, for the amount of his cash balance and nominal damages for dishonouring his check, and B. & Co. having brought actions against A. upon bills of exchange to a larger

PRACTICE.

Set-off (continued).

amount which they had discounted for him, the judge stayed the execution in A.'s action until the fifth day of the following term. B. & Co.'s actions in the meantime ripened into judgments. The Court allowed the judgments to be set off against each other (subject to the lien, if any, of A.'s attorney), notwithstanding A. had in the meantime become bankrupt, and thus the interests of third parties had intervened. *The Alliance Bank of London and Liverpool, Limited, v. Holford*, 460.

Notice of Trial.

5. A cause stood for trial at the sittings after Trinity Term. The defendant obtained a judge's order for a commission to examine witnesses abroad, the commission to be returnable on the 30th of November, and the trial being postponed until the sittings after Michaelmas Term. No fresh notice of trial was given, and the cause was taken as an undefended cause:—The court set aside the trial. *Cawley v. Knowles*, 107.

Staying Proceedings,—See JOINT STOCK COMPANY, 2.

PRE-PAID FREIGHT,—See INSURANCE, 1.

PRINCIPAL AND AGENT.

Authority of Agent.

The plaintiff advertised a house to be let referring for particulars to E., a house-agent. The defendant called upon E. and proposed to take the house from the following Michaelmas-day at a certain rent, and wrote down a specification of alterations and repairs which he would require to have done; and E., with his assent, wrote to the plaintiff, communicating to him the defendant's proposal, with a copy of the specification of repairs, and telling him that he had already set about doing them. In an action brought in a county court for a year's rent, or for the breach of the contract, the above letter was tendered in evidence on the part of the plaintiff, but was rejected by the judge; and the plaintiff was nonsuited. On appeal to this court, pursuant to the 14th section of the 13 & 14 Vict. c. 61,—Held, that the letter was properly rejected. *Clarke, app., Fuller, resp.*, 24.

PRIVILEGED COMMUNICATION,—See SLANDER.

PROHIBITION.

To a County Court.

1. Prohibition will not lie to the county court, however erroneous its decision, where there is jurisdiction. *Norris, app., Carrington, resp.*, 396.

2. Where cause is shown against a rule in the first instance, the costs are in all cases in the discretion of the court, but will rarely be given. *Ib.*

PROMOTIONS,—See MEMORANDA.

PUBLIC HEALTH ACT, 1848.

Apportionment of Expenses of Sewering, &c.

Interest.—1. The 67th section of the Public Health Act, 1848, gives the local board of health power to recover in a summary manner from the owners of the frontage their respective proportions of the expenses legally incurred by the board in sewerage, levelling, paving, &c., the street: and the 62d section of the Local Government Act, 1858, provides that these expenses may be recovered from the person who is the owner of such premises when the works are completed for which such expenses have been incurred, and shall bear interest at the rate of 5 per cent. per annum till payment. The 120th section of the Public Health Act, 1848, gave an appeal to the general board of health against the decision of the local board in respect of these expenses, and empowered the general board to make "such order in the matter as to them may seem equitable," and declared that "the order so made shall be binding and conclusive upon the said local board:" and the 65th section of the Local Government Act, 1858, enacts that memorials under the 120th section of the former act shall be addressed to one of the secretaries of state, "who shall have the same powers in respect thereof as are vested in the general board of health by the said section:"—Held, that the award of the home secretary under the last-mentioned provision is conclusive of the amount due as well for interest as for principal, though no mention is made therein of interest. *Wallington, app., Willes, resp.*, 797.

2. But, *semble*, that no interest is payable unless the amount really due from the party for his proportion of the expenses of the works has been demanded. *Ib.*

3. Therefore, where the award of the home secretary was for a smaller sum than that demanded by the board, and professed to be for a given sum "in full of all demands," the award was held conclusive, and the board not entitled to interest up to that time. *Ib.*

PUBLIC HEALTH ACT, 1848.

By-Laws under 21 & 22 Vict. c. 98.

4. The 34th section of the Local Government Act, 1858 (21 & 22 Vict. c. 98), which, after repealing the previous provisions on the subject in the Public Health Act, 1848 (11 & 12 Vict. c. 63) enacts that the local board may make by-laws, amongst other things, "with respect to the closing of buildings or parts of buildings unfit for human habitation, and to prohibition of their use for such habitation,"—"provided always that no such by-law shall affect any building erected before the date of the constitution of the district,"—does not authorize the local board to make such a by-law so as to affect premises erected prior to 1853, when the district was formed. *Burgess v. Peacock, Clerk to the Local Board of Health of the District of Barnsley*, 624.

Arbitration under 11 & 12 Vict. c. 63, s. 123.

5. By the 69th section of the Public Health Act, 1848 (11 & 12 Vict. c. 63), power is given to the local board, in case any street (not being a highway) be not sewered, levelled, paved, &c., to their satisfaction, by notice to the owners or occupiers of premises abutting thereon to require them to sewer, level, pave, &c., the same within a given time; and, if such notice be not complied with, the local board may execute the works therein referred to; and "the expenses incurred by them in so doing" are to be paid by the owners in default, according to the frontage of their respective premises, and in such proportions as shall be settled by the surveyor, or, in case of dispute, by arbitration, as pointed out by s. 123:—Held, that a notice informing the owners that the street was not "sewered, levelled, paved, flagged and channelled, metalled, and made good to the satisfaction of the board," and requiring the parties within one month to sewer, level, &c., the same, and intimating that in default the works would be executed by the board, was sufficient, without going on to specify the breadth, level, or any other particulars,—the notice containing a note at the foot,—“Particulars of the necessary works may be obtained from the borough surveyor, Office, No. 3, Town Hall,” where plans and specifications were lodged. *Bayley, Collector of Rates for the Local Board of Health of the Borough and Corporate District of Wolverhampton*, app., *Wilkinson*, resp., 161.

6. Held also, that the power of the arbitrator under s. 123, is limited to an inquiry into the apportionment of the expenses amongst the several owners of property liable to contribute; and that he is not entitled to inquire whether the gross amount of the expenditure was reasonable or necessary,—dubitante *Willes*, J. *Ib.*

7. The local board on the 8th of April, 1861, gave notice to the owners of certain property under s. 69, and on default being made, executed the works themselves, and by their surveyor apportioned the expenses amongst the several owners, and on the 11th of March, 1862, demanded payment. The landowners on the 10th of June gave notice to the board that they disputed the proportion settled by the surveyor to be due from them in respect of the works executed by the board, "on the ground that the cost of the said works was excessive and unfair." The board, treating this notice as a nullity, issued summonses against the owners, which summonses were on the 11th of October dismissed. On the 14th of October, the landowners gave notice to the board that they abandoned their notice of the 10th of June, and that they did not dispute the proportions of the expenses incurred by the board. Notwithstanding this, the board afterwards, on the 18th of October, gave notice of arbitration, and appointed an arbitrator, who on the 31st of December made his award,—slightly reducing the demand:—Held, that, there being no longer any matter in dispute, the appointment of the arbitrator was void, and his award consequently incapable of being enforced. *Ib.*

RAILWAY COMPANY.

Compensation under the Lands Clauses Consolidation Act, 1845.

1. *Diversion of Way.*—One who sustains a private and particular injury from the diversion or obstruction of a public road by the works of a railway company, which diversion or obstruction, if done without the sanction of an act of parliament, would give a right of action, is entitled to compensation under the Lands Clauses Consolidation Act, 1845. *Wood v. The Stourbridge Railway Company*, 222.

2. *Crossing on a level.*—No compensation can be claimed under the Lands Clauses Consolidation Act, 1845, for inconvenience sustained from the authorized crossing on a level of a public road by a railway. *Ib.*

3. *Good-will.*—Held, upon the authority of *Chamberlain v. The West End of London and Crystal Palace Railway Company*, 2 Best & Smith 605 (in error, 617), and *Senior v. The Metropolitan Railway Company*, 2 Hurlst. & Colt. 258,—that loss of trade occasioned by the obstruction of a passage leading to a thoroughfare in which the claimant's shop is situate, whereby customers were prevented from coming there, is a particular damage in

RAILWAY COMPANY.

Compensation under the Lands Clauses Consolidation Act, 1845 (continued).

respect of which the party is entitled to compensation under the Lands Clauses Consolidation Act, 1845. *Cameron v. The Charing Cross Railway Company. Bourhill v. Same*, 430.

4. *Form of Notice.*—Held, also, that “the nature of the interest in such lands, in respect of which the party claims compensation” is sufficiently described in such a notice as the following,—“I, A. B., do hereby give you notice that I am the occupier of a dwelling-house, bake-house, and shop, situate, &c., and which said premises are used by me for carrying on therein my business as a baker, and that you have during and in consequence of the construction of, &c., injuriously affected my said dwelling-house, bake-house, and shop, and occasioned loss and damage to me in my business, by the blocking up of the passage,” &c. (a public way), “and thereby preventing the passing of customers to my said bake-house and shop, and causing a great diminution in my business: and I give you notice that I claim 300*l.*” &c.; and that it was not necessary to go on to describe the precise legal interest which the claimant had in the premises, whether as leaseholder, tenant from year to year, &c., &c. *Ib.*

Equality of Tolls.

5. Judgment of the Court of Common Pleas, 14 C. B. N. S. 1 (E. C. L. R. vol. 108), affirmed. *Bazendale v. The Great Western Railway Company*, 137.

RE-ENTRY.

Right of,—See COVENANT.

REGULA GENERALIS.

Sheriff's Fees, 576.

REFORMATORY.

Rateability of.

A reformatory established under the provisions of the statutes 17 & 18 Vict. c. 86, 18 & 19 Vict. c. 87, 19 & 20 Vict. c. 109, and 20 & 21 Vict. c. 55, is not rateable to the relief of the poor,—though a part of its support is derived from weekly payments contributed by the parents of the inmates, and part from the proceeds of work done by the inmates,—washing, mangling, and needlework,—for strangers. *Sheppard, app., The Churchwardens, &c., of Bradford, resp.*, 369.

RELATION,—See BANKRUPTCY AND INSOLVENCY, 2, 5.

RIGHT OF WAY.

Appurtenant to Land.

1. A right of way appurtenant to land passes to the tenant by a parol demise of the land, though nothing is said about it at the time of the demise. *Skull v. Glenister*, 81.

2. A., having a right of way to a close, demised the close to B. The latter, being possessed of an adjoining close, upon which he was erecting certain houses, used the way for carting building materials to A.'s close for the purpose of using them upon his own land:—Held, that it was properly left to the jury to say whether B.'s use of the road was a bona fide exercise of the right of way to A.'s close, or a mere colourable mode of getting to his own land. *Ib.*

Reservation of.

3. One Purser the owner in fee of an estate called “the Lyde Field estate,” having sunk a shaft for working coals thereunder, staked and set out a road across the Lyde Field estate from a public highway on the west to the colliery, and to the east to another public highway. The road from the west to the colliery being formed, but the remainder to the east being only staked out, Purser in 1832 agreed with one A. for the sale to him of a piece of land which was described in the conveyance (not executed until the 1st of December, 1840), as being “bounded on the north by the road leading to the said Purser's colliery,” “together with the free use and enjoyment by A., his heirs, appointees, tenants, and assigns, of the above-mentioned road leading to the said colliery at all times and on all occasions, he and they contributing a proportionate part of the expense of keeping such road in repair.” In 1846, A. conveyed this piece of land, together with the right of way, to the plaintiffs:—Held, that the deed of 1840 conveyed to A. and his assigns the right to use the road across the Lyde Field estate to the east as well as to the west,—though part of it was only staked out at the time of sale. *Wood v. The Stourbridge Railway Company*, 222.

4. In December, 1854, P. conveyed another piece of land to the plaintiffs, which was described in the conveyance as “bounded on the north by a road laid out by the said P. across the Lyde Field estate from a road leading from the Lye Waste into the road leading from Dudley to Cradley, together with the free use and enjoyment by the grantees, their heirs, appointees, tenants, and assigns, of the above-mentioned road leading across

RIGHT OF WAY.*Reservation of (continued).*

the Lyde Field estate at all times and on all occasions, on contributing a proportionate part of the expense of keeping it in repair." At the date of this conveyance the road across the Lyde Field estate had been completely formed throughout its whole length, but a chain or bar had been placed by P. across the road to the east of the plaintiffs' premises, and their right to use that part of the road was occasionally disputed by him:—Held, that, under the deed of December, 1854, the plaintiffs acquired a right of way over that part of the road across the Lyde Field estate which lay to the east of their premises, for the use of the premises conveyed by that deed. *Skull v. Glenister*, 81.

5. In 1858, the plaintiffs purchased from one B. a piece of land (abutting upon the land conveyed to A. by the deed of December 1st, 1840), which was described in the conveyance as "adjoining at one end thereof to a certain road or highway leading from Cradley Forge to Rowley Regis." At the time of this purchase, the only mode of access to this piece of land was by means of an opening at the west corner upon the road described in the conveyance. By an act for the formation of the Stourbridge Railway, a new road was directed to be made in lieu of a portion of the old road numbered 4 on the plan deposited under the standing orders, and that so much of the road numbered 22 thereon as should lie between the point at which such new road terminated and the point where the road numbered 4 met the road numbered 22, should cease to be used as a public highway, "without prejudice to the existing rights of the owners and occupiers of adjoining lands at all times thereafter to use the same for all purposes:—"Held, that this reserved to the plaintiffs a right of way to the whole of their premises over that part of the road numbered 22 which lay between the new road and the point where the road numbered 4 met it. *Ib.*

ROYALTIES,—See LETTERS PATENT.**SALE OF GOODS.***Terms of Credit.*

Goods were sold upon the following terms,—" $2\frac{1}{2}$ per cent., or three months' bill,"—which was explained to mean cash at the expiration of the month succeeding the current month, deducting a discount of $2\frac{1}{2}$ per cent., or, at the buyer's option, a bill at three months from the same period. The buyer having refused to accept a bill at the end of the second month,—Held, that the seller might at once sue him for goods sold and delivered (concessit solvere in the Mayor's Court, London), and was not bound to wait the additional three months. *Rugg v. Weir*, 471.

SALE BY SAMPLE,—See PLEADING.**SALMON FISHERY.***Fishing Mill-Dam.*

It is no answer to a complaint against the occupier of a "fishing mill-dam," under the Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), for not lifting or removing the hatches or sliding-doors of his fishery during the close season, that the doing so would to some degree injuriously affect, but not ruinously, his milling-power. *Hodgson, app., Little, resp.*, 198.

SERVANT,—See MASTER AND SERVANT.**SET-OFF.***Of Cross-Judgments.*

A. having obtained a verdict against B. & Co., his bankers, for the amount of his cash balance and nominal damages for dishonouring his check, and B. & Co. having brought actions against A. upon bills of exchange to a larger amount which they had discounted for him, the judge stayed the execution in A.'s action until the fifth day of the following term. B. & Co.'s actions in the meantime ripened into judgments. The Court allowed the judgments to be set off against each other (subject to the lien, if any, of A.'s attorney), notwithstanding A. had in the meantime become bankrupt, and thus the interests of third parties had intervened. *The Alliance Bank of London and Liverpool, Limited, v. Holford*, 460.

SHERIFFS' FEES, 576.**SHIPPING.***Bill of Lading.*

1. The consignee of goods under a bill of lading, has no right to deduct from the freight payable on delivery of goods the value of articles which, though mentioned in the bill of lading, turn out not to have been put on board. *Meyer v. Dresser*, 646.

SHIPPING.

Bill of Lading (continued).

2. *Semble*, that evidence of a usage to that effect would not be admissible. *Meyer v. Dresser*, 646.

3. The 3d section of the Bills of Lading Act, 18 & 19 Vict. c. 111, does not make the bill of lading conclusive evidence against the owner that the goods were put on board. *Ib.*

4. The statute operates where the bill of lading is signed by the master who is part-owner, and who sues on behalf of himself and his co-owners. *Ib.*

5. A. orders a cargo of timber of B. at M., with directions to charter a ship to bring it to London. B. accordingly charters a ship and sends the bill of lading endorsed to A. with a draft for the invoice price, which A. accepts and pays:—*Semble*, that A. is a "consignee or endorsee for valuable consideration," within the meaning of the 3d section of the Bills of Lading Act. *Ib.*

SLANDER.

Privileged Communication.

1. In an action for slander in giving a character of a servant, although the occasion *prima facie* justifies the communication of matter which would otherwise be actionable, yet if, at the close of the plaintiff's case, there is any evidence which would warrant the jury in inferring actual or express malice, the judge cannot withdraw the case from them. *Jackson v. Hopperton*, 829.

2. Thus, where the defendant, in answer to an inquiry as to her character, charged the plaintiff with acts of dishonesty, having previously told her, that, if she would acknowledge having committed them, he would give her a character:—Held, that it was properly left to the jury to say whether the defendant *bona fide* believed the charge to be true, or was influenced by sinister or corrupt motives. *Ib.*

SLAVE-TRADE,—See PETITION OF RIGHT.

SOUTHAMPTON DOCK ACT.

Construction of.

Landing tolls.]—The Southampton Dock Company are empowered by their act 6 W. 4, c. xxix., s. 149, to charge for the landing of goods in their dock, the several sums mentioned in the schedule thereto annexed, and for articles not therein particularized, such sums as shall be equal to the sums affixed on goods, &c., "of a similar nature, package, value, and quality" in the schedule. All the charges mentioned in the schedule were of small fixed sums,—none being *ad valorem* except the charge for "sculptured marble" and "marble slabs." At the end was a note,—“Goods not included in the foregoing schedules to be charged in proportion to the rates therein specified, according to size and weight:”—Held,—affirming the judgment of the court below, 14 C. B. N. S. 243,—that the company were not entitled to make an *ad valorem* charge for the landing of goods not enumerated, or at all approaching, in "nature, value, and quality," to any of those enumerated in the schedule. *Southampton Dock Company v. Hill*, 567.

SPECIAL JURY.

Notice to the Sheriff.

Where the defendant obtains a rule for a special jury (in a town cause), but omits to give notice to the sheriff under the 112th section of the Common Law Procedure Act, 1852, that the cause is to be tried by a special jury, in the absence of a special jury, the cause may, under s. 113, be tried by a common jury. *Cawley v. Knowles*, 107.

STATUTE OF FRAUDS.

Contract to answer for the Debt or Default of a Third Person.

1. The plaintiff had contracted to supply goods to C. & Co., to be paid for in cash on each delivery. C. & Co. being desirous of obtaining the goods on credit, the defendant (who had an interest in the performance of the work upon which the goods were to be used) promised the plaintiff, that, if he would supply the goods to C. & Co. at a month's credit, and would allow him (the defendant) 3 per cent. upon the amount of the invoice, he would pay him cash, and take C. & Co.'s bill, without recourse:—Held, a contract to answer for the debt or default of another, within the 4th section of the Statute of Frauds. *Mallett v. Bateman*, 530.

Memorandum under the 29 Car. 2, c. 3, s. 4.

2. The plaintiff advertised a house to be let referring for particulars to E., a house-agent. The defendant called upon E. and proposed to take the house from the following Michaelmas-day at a certain rent, and wrote down a specification of alterations and repairs which he would require to have done; and E., with his assent, wrote to the plaintiff, communicating to him the defendant's proposal, with a copy of the specification of repairs, and

STATUTE OF FRAUDS.

Memorandum under the 29 Car. 2, c. 3, s. 4 (continued).

telling him that he had already set about doing them. In an action brought in a county court for a year's rent, or for the breach of the contract, the above letter was tendered in evidence on the part of the plaintiff, but was rejected by the judge; and the plaintiff was nonsuited. On appeal to this court, pursuant to the 14th section of the 13 & 14 Vict. c. 61,—Held, that the letter was properly rejected; and that, assuming it was admissible as a letter written and signed by an agent duly authorized for that purpose by the defendant, it was not such a memorandum of the bargain as to satisfy the 4th section of the Statute of Frauds, inasmuch as it was a mere proposal, and did not specify the commencement or the duration of the term, so as to amount to evidence of a contract. *Clarke, app., Fuller, resp., 24.*

Memorandum under the 29 Car. 2, c. 3, s. 17.

3. In an action for not accepting goods bought through a broker, the *old-note*, bearing the signature of the broker, who acted for both buyer and seller, is a note or memorandum in writing of the bargain signed by a lawfully authorized agent of the buyer to satisfy the requirements of the 17th section of the Statute of Frauds. *Parton, app., Crofts, resp., 11.*

STIPULATION,—See COVENANT.

SUMMONS, WRIT OF,—See WRIT OF SUMMONS.

SURGEON,—See MEDICAL PRACTITIONER.

TITHES.

Rateability of Land allotted in lieu of Tithes,—See POOR-RATE.

TOLLS.

See CANAL COMPANY. SOUTHAMPTON DOCK ACT. RAILWAY COMPANY, 5.

TOTAL LOSS,—See INSURANCE.

TYNE KEELMEN

Construction of 1 G. 4, c. liii.

1. By a local act, 1 G. 4, c. liii., a toll or tax of $\frac{1}{4}$ d. per chaldron is imposed upon the owners or lessees of "any collieries or coal-mines near the river Tyne," for every chaldron of coals sold or delivered by them to be exported from or out of the said river, and which shall be so exported; such toll "to be collected or received at the offices or places respectively where the contracts for the sale or delivery of such coals are usually made,"—in aid of the Tyne keelmen's charitable fund created by the 28 G. 3, c. 59. Since the formation of railways and docks, the services of the keelmen in the shipment of coals on the Tyne have become unnecessary, the coals being brought down to the wharfs or quays by railways, and shipped direct:—Held, that coals shipped on the Tyne from collieries "near" to the river are still liable to the payment; and that a colliery situate ten miles from the Tyne is "near the said river Tyne," within the meaning of the act. *Tyne Keelmen v. Davison, 612.*

2. Held also, that coals brought for shipment to the Tyne, by a public railway, from collieries which before the formation of the railway had always shipped their coals on the river Wear, to which they had been conveyed by tramways from the collieries, were equally liable to the keelmen's dues. *Ib.*

UMPIRE,—See ARBITRAMENT, 2.

USAGE,—See SHIPPING, 1, 2.

VESTING-ORDER,—See BANKRUPTCY AND INSOLVENCY, 6.

VOLUNTEER-ASSISTANT,—See NEGLIGENCE, 2.

WAY, RIGHT OF,—See RIGHT OF WAY.

WINDING UP,—See JOINT STOCK COMPANY, 2.

WITNESS.

Compulsory Attendance under 17 & 18 Vict. c. 34.

The 17 & 18 Vict. c. 34, is not available to compel the attendance of a person in Ireland as a witness before one of the Masters of this court upon a compulsory reference under the Common Law Procedure Act, 1854. *O'Flanagan v. Geoghegan, 636.*

WRIT OF SUMMONS.

For Service Abroad, under 15 & 16 Vict. c. 76, s. 18.

1. An Irish judgment for a debt contracted in England does not constitute a "cause of action which arose within the jurisdiction" of the superior courts of this country; within the meaning of the 18th section of the Common Law Procedure Act, 1852; nor does its remaining unsatisfied, the debtor being in this country, constitute "a breach of a contract made within the jurisdiction." *Thelwall v. Yelverton*, 813.

2. A. sued B. in Ireland for a debt alleged to have been contracted at Hull, and obtained a judgment for 259*l.* 17*s.* 3*d.* debt, and 470*l.* 14*s.* 11*d.* costs. B. having gone abroad, A. sued out a writ against him for service out of the jurisdiction, under the 15 & 16 Vict. c. 76, s. 18, endorsed for 730*l.* 12*s.* 2*d.*, and 10*l.* for costs, and, upon affidavits that B. was justly and truly indebted to him in the sum of 730*l.* 12*s.* 2*d.* "upon and by virtue of the judgment recovered in Ireland," that "the sum of 259*l.* 17*s.* 3*d.*, part of the sum recovered by the said judgment, was a debt contracted by B. at Hull, and the sum of 470*l.* 14*s.* 11*d.*, the residue of the sum of 730*l.* 12*s.* 2*d.* so recovered, was for his costs of suit in that behalf," and that B. was personally served with the writ in Paris,—obtained an order to proceed, and filed a declaration and particulars of demand claiming the whole 730*l.* 12*s.* 2*d.* "upon and by virtue of the judgment" obtained against B.:—The court, upon an affidavit of B. that he was never served with the writ, and that, at the time of the alleged service, and for some time before and since, he was residing upwards of 200 miles from Paris, set aside the service, the order, and the subsequent proceedings, on the ground that there had been no service of the writ, and that the affidavits disclosed that A. was proceeding for a cause of action which did not arise within the jurisdiction of the English courts. *Ib.*

3. *Quære*, whether the order would have been good if it had been limited to the original cause of action alleged to have arisen at Hull? *Ib.*

